Supreme Court, U. S.
FILED
SEP 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-440

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, an Illinois Political Subdivision, JOHN R. CANTERBURY, JAMES A. CUMMINGS, BONNIE W. NOBLE, CLYDE WEST, HAROLD A. (PETE) VONACHEN, JR., Individually and Members of the Board of Trustees of the Pleasure Driveway and Park District of Peoria; RHODELL E. OWENS, Individually and as Director of Parks and Recreation; JACK M. FULLER, Individually and as Administrative Assistant; DANIEL B. OHLEMILLER, Individually and as Business Administrator; FRANK D. BORROR, Individually and as Superintendent of Maintenance; WILLIAM McD. FREDERICK, Individually and as Attorney of Pleasure Driveway and Park District of Peoria; GOLF SHOP MANAGEMENT, INC., an Illinois Corporation; and GORDON RAMSEY,
Petitioners,

v.

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES and RICHARD HOADLEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	9
I. The Decision Below Conflicts With Parker v. Brown, and Decisions in Other Circuits, Misapplies Goldfarb and Cantor, and Conflicts With the Seventh Circuit's Own Decisions in This Case's Predecessor, and Metro Cable	9
II. Under 42 U.S.C. Section 1983, the Respondents Were Not Deprived of Their Civil Rights Under Color of State Law Where No Property Right in Such Employment Is Alleged and Where Numerous Valid Reasons Exist for Such Discharges Even Though One of the Reasons Is Alleged to Have Been a Protected Right	16
III. The Principles of Comity and Full Faith and Credit for State Court Actions Are Essential to the Welfare of Our Judicial System and Are Seriously Breached by This Court of Appeals Decision	18
Conclusion	30
Appendix A—Opinion of the United States Court of Appeals for the Seventh Circuit	A-1

Appendix B—Order of the United States Court of Appeals for the Seventh Circuit denying petitioner's Petition for Rehearing En Banc A-25

Appendix C—U.S. District Court's Opinion and Order Allowing Petitioner's Motion to Dismiss A-26

Appendix D—Order of the United States Court of Appeals for the Seventh Circuit in Case Number 74-1342 .... A-37

Appendix E—U.S. District Court's Opinion and Order in Case Number P-CIV-74-11 (Seventh Circuit Case Number 74-1342) A-41

Appendix F—U.S. District Court's Orders in Case Number P-CIV-74-11 and P-CIV-75-60 ..... A-44

Appendix G—Opinion of the Appellate Court of the State of Illinois for the Third District in Case Number 74-127 A-48

Appendix H—Opinion of the Appellate Court of the State of Illinois for the Third District in Case Number 76-14 . . A-61

Appendix I—Respondents' Motion for Leave to File Additional Authority and for other Incidental Relief in Case Number 76-14 ..... A-73

Appendix J—Memorandum of Decision of the Circuit Court of the Tenth Judicial Circuit of Illinois in case number 75 L 2893 (Third District case number 76-14) A-78

Appendix K—Injunction Order and Judgments of the Circuit Court of the Tenth Judicial Circuit of Illinois in Consolidated Case Number 75 M 3128 and 75 E 3231 (Third District Case Number 75-318—Appeal dismissed without opinion November 19, 1975) A-82

Appendix L—Order of Hon. Wilbur F. Pell, Circuit Judge of the United States Court of Appeals for the Seventh Circuit of August 25, 1977 ..... A-90

Appendix M—Decision and Order of the U.S. District Court on June 30, 1976, in Case Number P-CIV-76-9 . A-91

Appendix N—Constitutional Provisions and Statutes Involved A-93

Authorities

Cases:

Asheville Tobacco Board of Trade, Inc. v. F.T.C., 263 F. 2d 502 (4th Cir. 1959) 12

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 16, 17, 18

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 12, 13, 14, 15

City of LaFayette, Louisiana v. Louisiana Power and Light Company, 532 F. 2d 431 (5th Cir. 1976) 9, 10

Duke & Company, Inc. v. Foerster, 521 F. 2d 1277 (3rd Cir. 1975) 9

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 9, 14

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 29

E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966) 9

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 9, 12, 13, 14

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 29

Juidice v. Vail, — U.S. — (1977) 29

LaDue Local Lines, Inc. v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District, 433 F. 2d 131 (8th Cir. 1970) 9

Lowenstein v. Evans, 69 F. 908 (C.C.D.S.C. 1895) 11

Metro Cable Co. v. CATV of Rockford, Inc., 516 F. 2d 220 (7th Cir. 1975) 9, 14, 15

Mt. Healthy City School District v. Doyle, — U.S. — (1977) 16, 17, 18

Olsen v. Smith, 195 U.S. 332 (1904) 11

Padgett v. Louisville and Jefferson County Air Board, 492 F. 2d 1258 (6th Cir. 1974) 9

Parker v. Brown, 317 U.S. 341 (1943).9, 10, 11, 12, 13, 15, 16

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 29

State of New Mexico v. American Petrofina, Inc., 501 F. 2d 363 (9th Cir. 1974) 9

Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F. 2d 341 (9th Cir., 1969) 9, 14

Union Pacific R. Co. v. United States, 313 U.S. 450 (1941) 12

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) 9, 14

Younger v. Harris, 401 U.S. 37 (1971) 29

Constitutional Provisions and Statutes

United States

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 .....2, 3, 16, 17

15 U.S.C. Sections 1, 2, 15 and 26 ..... 3, 7

Rule 12(b) F.R.C.P. 7

Fourteenth Amendment to U.S. Const. 10

Illinois

1970 Illinois Constitution, Article IX, Section 5 .....3, 19

Illinois Revised Statutes (1975):

Ch. 105, Section 8-10 .....3, 11, 21

Ch. 105, Section 9.1-1 .....3, 11, 21

Ch. 127, Section 132.1 et seq. 3, 11

Miscellaneous

Handler, The Current Attack on the Parker v. Brown State Action Doctrine, 76 Colum. L. Rev. 1976.10, 13, 15

Verkuil, State Action Due Process and Antitrust: Reflections on Parker v. Brown, 75 Colum. L. Rev. 328 .....10, 12, 16

21 Cong. Rec. 2456 et seq. (1890) 11

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Petitioners,

v.

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES and RICHARD HOADLEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on May 26, 1977, reversing a judgment of the United States District Court for the Southern District of Illinois in favor of the Petitioners, dismissing Respondents' Complaint, petition for rehearing *en banc* denied on August 11, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals is set out in Appendix A, and is reported at 557 F.2d 580 (7th Cir. 1977). The order of the United States Court of Appeals denying Petitioner's petition for rehearing *en banc* is set out in Appendix B. The order and opinion of the United States District Court for the Southern District of Illinois is set out in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals below (Appendix A), was entered on May 26, 1977. A timely petition for rehearing *en banc* was denied August 11, 1977 (Appendix B). This Petition for Writ of Certiorari was filed within ninety (90) days of the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioners are subject to the Federal Antitrust Laws and treble damage liability?

2. Whether, under 42 U.S.C. § 1983, the Respondents were deprived of civil rights under color of state law for their discharges as employees, where no property right in such employment is alleged or where numerous valid reasons exist for such discharges even though one of the reasons is alleged to have been for a protected right?

3. Whether a Federal Court of Appeals may properly afford respondents additional opportunities to relitigate claims previously adjudicated in the Courts of Illinois and the federal courts or review those state court adjudications?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are reprinted in pertinent part in Appendix N:

1. 1970 Illinois Constitution, Article IX, Section 5;
2. 15 U.S.C. §§ 1, 2 and 15;
3. 42 U.S.C. § 1983;
4. Ch. 105, §§ 8-10 and 9.1-1 Ill. Rev. Stat. (1975);
5. Ch. 127, § 132.1 *et seq.*

STATEMENT OF THE CASE

Respondents (hereinafter referred to as "Golf Pros"), prior to December 31, 1973, pursuant to contracts, were independent contractors, authorized to operate golf pro shops at each of the five public golf courses owned and operated in trust for the public by Petitioner, PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, Illinois. During this period, the golf pros were also employed by the Park District as greenskeepers. The Park District is a unit of local government, organized under Chapter 105 Illinois Revised Statutes. The Golf Pros and the Park District could not agree to renewal contracts to operate the golf pro shops at the five public golf courses. The Petitioners, Board of Trustees of the Park District pursuant to a plan whereby the contract to operate the golf pro shops at the five public courses would be submitted for public bidding, voted to approve the highest bid and awarded Golf Shop Management, Inc. (hereinafter referred to as GSM), a three year contract.

On January 21, 1974, each of the golf pros was served with a 30-day written notice to terminate the tenancy of the premises

occupied by the pro shops and on January 22, 1974, the golf pros filed an action in the United States District Court, Case No. P-CIV-74-11, alleging violations of the Federal Antitrust and Civil Rights Laws. On February 13, 1974, the District Court Judge entered a Decision and Order dismissing the complaint with prejudice (App. E). The golf pros appealed to the United States Court of Appeals for the Seventh Circuit, Case No. 74-1342. On February 20, 1974, the golf pros were discharged as greenskeepers by the Park District. They did not pursue any of the administrative remedies available.

On February 20, 1974, while the appeal of the federal action was pending, the Park District initiated a forcible entry and detainer action against the golf pros in the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County, Case Number 74 M 602, to obtain possession of the golf pro shops and ancillary buildings located on the five public courses. The golf pros counterclaimed and after a jury trial, there was a decision in favor of the golf pros. The Park District appealed that decision to the Appellate Court of Illinois, Third District, Case Number 74-127. The trial court's order of May 6, 1974, in Case Number 74 M 602, provided that the enforcement of the judgment shall not be stayed, and the Illinois Appellate Court on May 7, 1974, stayed the enforcement of the trial court's order pending appeal. Despite that Court's order, the golf pros sought and received from the state trial court a mandatory injunction on June 26, 1974, which granted to them essentially the same relief provided in the trial court order of May 6, 1974. Thereafter, the Park District petitioned the Illinois Appellate Court for a Writ of Prohibition which was issued June 28, 1974, and which directed the trial court to vacate the orders pertaining to the injunctive relief that it had previously entered. The golf pros elected to challenge the authority of the Appellate Court to issue a Writ of Prohibition, and on September 23, 1974, filed a Motion for Leave to File Original Action for Writs of Mandamus, Prohibition and Supervisory Orders with the Illinois Supreme Court, Case Number 47015. The Third District Appellate Court and each judge of that Court were named as respondents. The Petition alleged that the proceedings and orders of the respondent Appellate Court constituted an abuse of judicial power, the abnegation of judicial duty and a means of defeating original and appellate jurisdiction in a manner which could not be remedied through the ordinary course of appeal. The Supreme Court denied leave to file the Petition on September 26, 1974.

On March 27, 1975, the Illinois Appellate Court filed its opinion in Case No. 74-127 reversing the order of the trial court (App. G.). The Illinois Supreme Court denied the golf pros' Petition for Appeal on May 27, 1975, and after the golf pros' request for a stay of mandate had been denied, the Clerk of the Appellate Court issued a Writ of Restitution on June 30, 1975, returning possession of the golf pro shops to the Park District.

There then ensued a series of attempts, some nine in number, by the golf pros to get either the Appellate Court of Illinois, Third District, or the Supreme Court of Illinois, Case Numbers 47045, 47469 and 47810, to reverse the Appellate Court's decision and for other relief. All were unsuccessful. The Park District finally obtained possession of the golf shops some eighteen months after the golf pros' possessory rights, as a matter of law, had expired.

While the state court appeal was pending, the United States Court of Appeals for the Seventh Circuit, although it found no cause of action alleged under either the Federal Antitrust or Civil Rights Acts, reversed and remanded the case to the District Court for a hearing on the golf pros' motion to open, alter or amend the judgment. (App. D). On remand the golf pros moved for voluntary dismissal of their federal case, which was allowed.

On July 25, 1975, the Park District filed an action for damages against the golf pros in the Circuit Court of the Tenth Judicial Circuit of Illinois. In response thereto, the golf pros filed an answer, five affirmative defenses, and a counterclaim. The counterclaim as originally filed sought treble damages under the Illinois' equivalent of the federal antitrust laws and was dismissed pursuant to motion. Subsequently, the golf pros filed a sixth defense, and an amendment, and a second amendment to the counterclaim. Most of the amended counterclaim was stricken, but Paragraph 6(f) which reads:

> "They [Park District, etc.] summarily and unlawfully terminated defendants' salaried employments."

was permitted to stand. After an extensive hearing on the merits, a judgment was entered for the Park District on its claim and against the golf pros on their counterclaim for alleged summary and unlawful termination (App. J). The golf pros appealed to the Appellate Court of Illinois, Third District, which affirmed the Circuit Court decision. (App. H). Rehearing was denied.

After the golf pros had vacated the golf shops, they filed three additional lawsuits challenging the Park District's right to possession. On August 8, 1975, a claim for forcible entry and detainer was filed against GSM, Case Number 75 M 3128, which was then in possession of the shops. That action was dismissed with prejudice, the golf pros were enjoined from filing any other suits challenging possessory rights to the golf concession shops, and judgment for attorney's fees was entered upon a finding that the allegations of the complaint were without reasonable cause and not in good faith (App. K). An appeal was filed in the Illinois Appellate Court, Case No. 75-318, and the Park District filed a motion to dismiss the appeal. The motion was allowed and the appeal was dismissed November 19, 1975.

On August 15, 1975, a second federal suit, Case Number P-CIV-75-60, was filed in the Federal District Court alleging

that the golf pros' rights to petition, to due process, and to equal protection of the law were violated by the state court proceedings. That claim was dismissed on the ground that the complaint sought to re-litigate issues which had been finally determined in the courts of Illinois. (App. F) No appeal was taken.

As the third federal suit, the golf pros brought this two count action against petitioners, Pleasure Driveway and Park District of Peoria, Illinois, a unit of local government; members of its Board of Trustees; its Director and Administrative Assistant; its Business Administrator; its Superintendent of Maintenance; its Attorney; GSM, and Gordon A. Ramsey, GSM's alleged sole incorporator. Count I is under 15 U.S.C. § 1, § 2, § 15 and § 26, seeking to have the contract declared null and void, to preliminarily and permanently enjoin the performance of it, and for damages in the amount of three times the amount the golf pros may be required to pay by reason of the state court judgments.

The Petitioners filed a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that Counts I and II failed to state claims for which relief could be granted; the complaint improperly sought to pursue a cause of action similar to ones which were unsuccessfully pursued by the golf pros in the state courts of Illinois; and that the orders of the State Courts of Illinois and the Federal District Court were *res judicata* of the matters and things alleged in the complaint. The District Court Judge found that as to Count I to the extent the same issues were raised as were raised in a previous federal action, P-CIV-74-11 the Respondents were barred by the principles of *res judicata* and as to any additional issues the petitioners were immune from the Federal Antitrust Laws. As to Count II the District Court Judge found the issues which the Respondents sought to litigate were previously adjudicated on the merits in the state courts. Accordingly, an order was entered allowing the motion to dismiss and dismissing the action

with prejudice (App. C). The golf pros appealed from this order and the United States Court of Appeals for the Seventh Circuit reversed in part and remanded (App. A).

It is this order of the Court of Appeals of the Seventh Circuit that is the object of this petition for certiorari.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Conflicts With Parker v. Brown, and Decisions in Other Circuits, Misapplies Goldfarb and Cantor, and Conflicts With the Seventh Circuit's Own Decisions in This Case's Predecessor and Metro Cable.

The decision below subjects a governmental unit to the federal antitrust laws and therefore sharply conflicts with the established principles that the federal antitrust laws do not apply to otherwise valid governmental action, *Parker v. Brown,* 317 U.S. 341 (1943); *State of New Mexico v. American Petrofina, Inc.,* 501 F.2d 363 (9th Cir. 1974); *Padgett v. Louisville and Jefferson County Air Board,* 492 F. 2d 1258 (6th Cir. 1974); *LaDue Local Lines, Inc. v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District,* 433 F.2d 131 (8th Cir. 1970); *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority,* 362 F. 2d 52 (1st Cir. 1966), and that they do not apply to genuine concerted action to induce government to take such action. *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F. 2d 220 (7th Cir. 1975); *Sun Valley Disposal Co. v. Silver State Disposal Co.,* 420 F. 2d 341 (9th Cir., 1969).

Although the principles are well established, recently in some instances, without additional guidance from this Court, some Circuit Courts of Appeal have misapplied *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975) and have found that political subdivisions of the state are subject to the federal anti-trust laws. *City of LaFayette, Louisiana v. Louisiana Power and Light Company,* 532 F.2d 431 (5th Cir. 1976); *Duke & Company, Inc. v. Foerster,* 521 F. 2d 1277 (3rd Cir. 1975).

"One of the most critical issues in antitrust today is the proper scope and meaning of the *Parker v. Brown* doctrine of state action." Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 Colum. L. Rev. 1 (1976) (Hereinafter referred to as "*Handler*"). This Court has recognized the importance of the issue as it is presently considering, pursuant to Writ of Certiorari, the decision in *City of LaFayette, Louisiana v. Louisiana Power & Light Company, supra.*

The issues set forth in this petition reach beyond the immediate parties to the present case and affect basic policies established by this Court involving the battle between regulation and competition, and concepts of federalism. The battle between trade regulation and competition is centuries old. *Handler, supra,* page 3. Prior to the antitrust laws, the due process clause of the 14th amendment to the United States Constitution was the vehicle used to try to limit state action by compelling all regulations except for natural monopolies, to conform to a competitive model. *Handler, supra,* page 7. This attempt was rejected by this Court. Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 Colum. L. Rev. 328, 331 (1975) (Hereinafter referred to as "*Verkuil*"). In *Parker v. Brown, supra,* this Court sensed the attack was shifting from the constitutional area to the statutory area, and rejected the attempt to use the antitrust laws as the means for limiting state action. *Verkuil, supra,* pages 332 and 333.

Of equal importance are precepts of federalism and this Court's stated concern for the proper respect for the role of the states in a dual system of government. *Parker v. Brown, supra,* page 351. To permit state action only where it is consistent with the Sherman Act policies is "repugnant to the basic premises of Federal laws." *Handler, supra,* page 13.[1] The states would be

[1] Professor Handler also observes that although the case law under *Parker v. Brown* may not be the clearest, a primary jurisdiction position is an invitation to a quagmire from which there may be no return. *Handler, supra,* page 14.

denied the right to regulate their own industries according to their ideas of public interest and would be denied the latitude, which the Federal Government itself possesses, to adopt regulations which permit anticompetitive practices. A flat overruling of *Parker v. Brown, supra,* and those cases from which it had its genesis, *Olsen v. Smith*, 195 U.S. 332 (1904) and *Lowenstein v. Evans*, 69 F. 908 (C.C.D.S.C. 1895).

The Park District is a unit of local government being authorized and existing under Ch. 105 Ill. Rev. Stat. (1975) with power to operate golf courses as well as necessary facilities pertinent thereto. Ch. 105, § 8-10; § 9.1-1 Ill. Rev. Stat. (1975). The Park District was involved in a valid governmental function of operating public golf courses on public land for public benefit when its elected trustees, in carrying out their official duties with which they are charged, awarded the right to operate the golf pro shops at the five public courses, which it owned, to Golf Shop Management, Inc., the highest bidder, as required by the Illinois Public Bidding Act, Ch. 127, § 132.1, *et seq.*, Ill. Rev. Stat. (1975).

An examination of the legislative history of the Sherman Act reveals that Congress was concerned with "private parties", "profiteers" acting through "trusts" or "business combinations", whose shareholders could not be controlled by the states. 21 Cong. Rec. 2562 (1890). Nothing in the legislative history indicates that Congress intended the Sherman Act to be applicable to a unit of government such as the Park District which is a public body, without any shareholders who would receive a profit from its action, but which represents the public and the public interest, and one which is controlled by not only the State Legislature but by the public through the ballot. In the historical context the two things which Congress was concerned with, (1) excessive profits and monopolization and (2) lack of control or accountability, are not involved in the present case.

This Court in *Parker v. Brown, supra,* recognized Congress's concern and intent in holding that the antitrust laws do not apply to otherwise valid governmental action.[2] The only exception which the court in *Parker v. Brown* anticipated was based upon its previous decision in *Union Pacific R. Co. v. United States,* 313 U.S. 450 (1941), a non-antitrust case. In that case an action was brought under the Elkins Act by the United States against the Union Pacific and Kansas City, Kansas, to stop preferential treatment to merchants who moved from Kansas City, Missouri to Kansas City, Kansas. This Court held Kansas City, Kansas, was subject to the Elkins Act where the interests of the city were subservient to the interests of the private party.[3] But where the interests of the governmental unit are dominant, the *Parker v. Brown Doctrine* is applicable even if the government's participation results in a restraint of trade. In the present case, both the golf pros' complaint and the decision below acknowledge the interests of the Park District are dominant and the moving force behind its actions resulting in Golf Shop Management's acquiring the contract to operate the pro shops.

The decision below construes *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976) and *Goldfarb v. Virginia State Bank, supra,* as restricting the *Parker v. Brown Doctrine. Cantor* involved private parties' attempts to use state regulation as a shield from the antitrust laws and did not involve challenging the actions of a governmental unit by naming it and its officers, employees and agents as defendants. The question presented here

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[2] Prior to the enactment of the antitrust laws the courts had already sanctioned a public-private dichotomy which permitted a business with a "public calling" or a "business affected with a public interest" to exist in a monopolistic state. *Verkuil, supra,* page 328.

[3] Subsequent lower court decisions have continued this line of inquiry in antitrust cases, asking whether the challenged activity was taken by a body truly a unit of the state responsible to its citizens' needs, or "individual action masquerading as state action?" See *Asheville Tobacco Board of Trade, Inc. v. F.T.C.,* 263 F. 2d 502, 509 (4th Cir. 1959).

was not present in *Cantor.* Likewise *Goldfarb* cannot be construed as restricting the *Parker v. Brown* doctrine. In *Goldfarb,* at page 788, this Court reaffirmed the *Parker v. Brown Doctrine. Handler, supra,* page 11. *Goldfarb* involves the issue of whether the challenged activities constituted actions of the state so as to fall under the umbrella of protection provided by *Parker v. Brown,* and this Court decided that the actions of a group of lawyers, engaged in labor for private gain, did not constitute the actions of a unit of government which is entitled to that protection. *Goldfarb* was concerned in the first instance with whether a governmental unit was involved and not with the question of what treatment a governmental unit should receive under the antitrust laws, the question raised by this case. By deciding the first issue against the defendants, it never got to the second question. Such a result is consistent with the original intent of Congress to strike at private profit-oriented parties and this Court's position in *Parker v. Brown.* Underlying the *Goldfarb* decision are traditional antitrust concerns over the consequences of occupational licensing and barriers to entry for those who wish to compete, i.e. income transfer from consumer to the licensee and limitations upon the freedom of others to join the class. But that is not the situation in the present case. No license is needed by either the Park District or the golf pros to operate a golf pro shop. The Park District has no power to, and did nothing to, prevent the golf pros from competing. They could have bid on the contract, but elected not to do so. They were, and still are, free to be golf pros and sell golf equipment any place in the City of Peoria, County of Peoria, State of Illinois, the United States, or the world, except the Park District's five public courses.

The decision below relies very heavily on the allegations that the contract was a "sham", that the Park District's actions were an attempt to "coerce" the golf pros into raising and fixing prices and "punishing" them for refusing to do so, and that the

Park District was levying an "illegal" sales tax. Such allegations are designed to appeal to the emotions, but do not stand the test of scrutiny. These same allegations have been repeatedly made at all levels, Circuit Court through Illinois Supreme Court, in the state court litigation between these same parties, and not once has any state court found them to have any basis. Furthermore, not only did the state Circuit Court, Case Number 75 L 2893 (App. J) and the Appellate Court of Illinois, Case Number 76-14 (App. H) reject such allegations, but in fact used the contract as the measure of damages due the Park District for the golf pros' illegal holding of possession of the pro shops. These allegations involve violations of state law and the golf pros cannot turn what is basically a claim of violation of state laws into a federal antitrust claim. *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F. 2d 341 (9th Cir. 1969). But this is exactly what the decision below permits, even though the state courts have failed to find an illegality.

The decision below also conflicts with the Seventh Circuit's previous decision in *Metro Cable v. CATV of Rockford, Inc.*, 516 F. 2d 220 (7th Cir. 1975), which involved this Court's *Noerr-Pennington Doctrine* as set forth in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), and the Seventh Circuit's previous decision in the first federal case between these parties, Case Number 74-1342 (App. E). Without elaboration the decision below sweeps aside *Metro Cable* on the basis that it is "meaningfully different" on the facts, and that *Goldfarb* and *Cantor* have undercut its validity. These are insufficient reasons for a case of this importance.

Its treatment of the first federal action between these parties is even more incredulous. The first federal action between these parties considered these same operative facts and same charges. The panel of the Seventh Circuit which heard the case consisted of Justice Clark, who participated in the development of the *Noerr-Pennington Doctrine* and other significant antitrust cases, and Justice Stevens who participated in *Metro Cable* and since has written the *Cantor* decision, and Justice Hastings. That panel stated:

> "We agree with the district court's determination that plaintiffs, in their original Complaint, failed to allege facts sufficient to demonstrate that their continued operation of the golf course pro shop concessions amounted to a property interest protected by the Fourteenth Amendment rather than a mere 'unilateral expectation'. [Citation omitted] Similarly, under *Parker v. Brown* [Citation omitted] and its progeny, we cannot read Count II of the Complaint as stating a cause of action under the federal antitrust laws." [App. D]

Yet the latest panel of the Seventh Circuit permits the complaint to stand even though a previous panel found no cause of action and the state courts found the allegations pertaining to "sham", "coercion", etc. to be baseless.

The issue, as stated by Professor Handler, *supra*, page 17, is whether the *Parker v. Brown Doctrine* still makes sense today. It is respectfully submitted that it does. The cases which would restrict the doctrine fail to recognize the extent of the activities heretofore taken by the states and their political subdivisions for public benefit, which would be invalidated, *Handler, supra*, pages 16 and 17, and previous judicial sanctioning of one of the most significant means by which states have traditionally controlled economic activities—government ownership and operation of a business activity. *Handler, supra*, page 8. Add to these reasons the current concern for returning authority and decision making to those governmental units in closest contact with the people[4] and the conclusion is quickly

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[4] An example of returning authority to the states and their subordinate unit of government is federal revenue sharing.

reached that *Parker v. Brown* makes as much sense, if not more sense, today than it did when pronounced. The values of federalism and judicial self restraint remain as important today as they did in the era of *Parker v. Brown, Verkuil, supra,* page 326, footnote 9. State governments and their political subdivisions thereof must be permitted to function in a manner which they believe is in the public's best interest. In the present case, the public's duly elected officials have acted. If the public believes that the action is not in their best interests, the officials are subject to the most powerful control available under our form of government, removal via the ballot. This has not occurred.

A full hearing should be granted in the present case so that this Court may consider the important Antitrust issues presented by the decision below.

II

Under 42 U.S.C. Section 1983, the Respondents Were Not Deprived of Their Civil Rights Under Color of State Law Where No Property Right in Such Employment Is Alleged and Where Numerous Valid Reasons Exist for Such Discharges Even Though One of the Reasons Is Alleged to Have Been a Protected Right.

The Seventh Circuit Court of Appeals failed to apply requirements as to what constitute actionable terminations of employment under 42 U.S.C. §1983 as dictated by this court in *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972), and *Mt. Healthy City School District v. Doyle,* — U.S. — (1977).

Without discussing here the state court findings as to the reasons for the discharges [See part III, pages 22-24, herein] the golf pros failed to allege, and the Seventh Circuit Court failed

to find any protected property right in said jobs as required by *Roth, supra.*

The Court of Appeals affirmed the dismissal of every allegation in Count II of the Complaint, except the charge that:

> "[The golf pros] were summarily terminated from their public employment position because they asserted their rights of petition and to due process by litigating their defenses to the Park District's forcible entry and detainer action." [Page 21 of the opinion].

Notwithstanding the fact that that claim has previously been litigated [see part III, pages 22-24], the Court of Appeals does raise an important question for another reason, in light of this Court's opinion in *Mt. Healthy, supra.*

As stated in *Mt. Healthy,* supra, the test for stating a claim for relief under 42 U.S.C. § 1983, in termination cases, is whether the protected conduct was the *sine qua non* for the discharge. The Court of Appeals' test is whether the protected conduct "to some extent at least" is a factor in the dismissal (Page 22 of the opinion). Besides being inconsistent with this Court's rule, the test as laid down by the Court of Appeals has harmful consequences. Where several valid reasons required discharge, such as the total uncooperativeness and unresponsiveness to the Park District and staff, as well as the refusal to vacate the golf shop premises, clearly owned by their employer, through a wrongful holdover prior to any litigation, the golf pros, by merely alleging that a factor in the discharge was their litigation in the courts,[5] have shrouded themselves with the convenient claim of constitutional protection. Of course, they could not allege, in light of previous judicial de-

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[5] The golf pros could not have been discharged for "litigating their defenses to the Park District's forcible entry and detainer action" [page 21 of opinion below (App. A)] because in point of time they were discharged before that action was filed.

terminations, that this litigation was the sole or even the substantial reason for the discharge, and to set out a test which requires no more, raises the identical problem faced in *Mt. Healthy, supra:*

> ". . . [The] candidate ought not to be able to engage in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision."

This Court has the opportunity here to give direction to its circuit courts so that the important doctrines of *Roth* and *Mt. Healthy* are completely understood and followed throughout the circuits.

III

The Principles of Comity and Full Faith and Credit for State Court Actions Are Essential to the Welfare of Our Judicial System and Are Seriously Breached by This Court of Appeals Decision.

The decision below improperly affords respondents additional opportunities to relitigate claims previously adjudicated in the courts of Illinois or the federal courts and is an improper review of those adjudications.

The Court of Appeals fails to give serious consideration to the prior federal opinions or the state court decisions, as well as Illinois law, but at the same time, shows the Court's willingness to construct a cause of action for the golf pros. The Court's opinion reveals the following contradictions:

(1) At page 3, the Court introduces those points which it "assumes" as true, notwithstanding past decisions of Illinois law, and begins by judicially noticing that:

> "The 1970 Illinois Constitution, Article IX, Sec. 5, provided for the *abolition of personal property taxes* and authorized the Illinois General Assembly to provide replacement revenue sources for local government units. *The General Assembly has not exercised its power to create substitute revenues for local park districts.* These facts, which we may and do judicially notice apparently led the Park District in 1973 to consider the possibilities of obtaining greater revenues from its golf course pro shop concessions." [emphasis added]

Contrary to that assumption the Illinois 1970 Constitution, Article IX, Sec. 5, says:

> "(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971."

Judicial notice cannot be utilized to impute "apparent" motives to a lawfully organized and operating governmental unit, especially when it is used to preclude a fair appraisal of the facts.

(2) At page 4, 18, and 20 the Court "assumes" as true, that:

> ". . . GSM would make an economically unrealistic 'sham' proposal, which would not be performed, to pay $90,000 a year for concession rights at the 5 golf courses [footnote omitted]."

It seems sufficient to note that:

> "GSM, via a successful bid as required by the Public Bidding Act, in fact obtained the concession rights. The contract (complaint, Ex. II) requiring a performance bond in the amount of $125,000 and an increased rent (to date

> GSM has paid the park district $120,000 which is 10 times the most ever received from the [golf pros] over a similar period) was executed and no allegation was made by the [golf pros] that it was not being performed." [Petition for Rehearing *en banc* pages 5 and 6].

or that that contract has been in performance for over 2 years. In view of comity and full faith and credit, it is more important that Judge Iben, in the state Circuit Court, relied on that contract after a full evidentiary hearing as the measure of the Park District's damages for the golf pros' wrongful holdover and characterized it as:

> "A measure of the fair value of the premises and/or licenses for the concession rights . . . arrived at by an arm's length, open bid." [see App. J.]

and that the Illinois Appellate Court affirmed this contract as evidence of the Park District's damage saying:

> "We believe the trial court properly used as a measure of damages a single sum composed of rental value and the value of an exclusive license. The trial court properly added to this sum the [Park District's] cost of paying personnel to perform duties which GSM would have performed under the contract, costs which were reasonably forseeable and would not have been incurred but for [the Golf Pros'] wrongful holdover. We find the trial court's determination of damages within the law and supported by the evidence." [see App. H.]

Attention is also drawn to Appendix K herein where the Illinois circuit court again dismissed the claim and enjoined the golf pros from disputing GSM's possessory rights under that contract.

Finally, Federal District Court Judge Robert Morgan's finding that:

> "[The golf pros] seek to enjoin or relitigate parts of a factual picture which has been heretofore judicially determined with finality, and thereby to raise federal antitrust and constitutional violations which simply do not exist. The material facts as heretofore shown beyond dispute or found by other courts, adequately demonstrate that [the Petitioners] exercised their public authority in the premises responsibly and with fairness to [the golf pros], without violation of any of [the golf pros'] rights under the United States Constitution, or otherwise. The idea that some kind of conspiracy was involved, or that the contracting with a single concessionaire for golf shop services created a 'single monopoly' of any legal significance, is pure fancy." [see App. M.]

was based on those prior state court decisions and even two prior federal actions, that contained claims of a "sham" proposal. Yet the Court of Appeals in its latest opinion fails to agree [see footnote 3 of the opinion, App. A] and that failure can only be explained by that Court's total disregard for the history of litigation wherein that exact claim was raised and adjudicated:

(3) At page 5, the Court "assumes" as true that:

> "The [golf pros] and each of them were not summarily terminated from their proprietary[6] business and local governmental employment rights because of the expiration of their 1973 'leases' but because on January 19, 1974, they refused to be coercively induced to levying unlawful 5% sales tax levies on their business consumers[7] and be-

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[6] In an effort to confuse the courts the golf pros keep using the word "proprietary" in reference to their former concession rights. In fact, the operation of golf courses and appurtenances is a "governmental" function of the Park District. Ch. 105, Sec. 8-10 and Sec. 9.1-1, Ill. Rev. Stat. (1975).

[7] The reason for the pros refusal to pay 5% of their gross as rent was, as stated in their brief to the Illinois Appellate Court in Case Number 76-14: "Among other reasons, the demand was prohibitive and (the golf pros) rejected it".

cause they refused to contract, combine or conspire with the effect of raising, fixing and maintaining their proprietary resale, rental and service prices contrary to Illinois and Federal antitrust laws." [Footnotes added]

Only a total disregard for the judicial history of this litigation can justify such an "assumption" since every court which had considered the claim that the golf pros were summarily or unlawfully terminated in their employment as greenskeepers had uniformly held that that claim is without merit and contrary to the facts and evidence (see Appendices H, J, K, F and C). That the court would "assume" such an allegation is true is even more reprehensible since the court later recognizes the claim that the golf pros were:

> ". . . summarily terminated from their public employment positions because they asserted their rights of petition and to due process by litigating their defenses to the Park District's forcible entry and detainer action." [page 21 of the opinion].

Of course, both of those claims cannot be true, but even that second claim has been raised and adjudicated *several* times [see appendicies H, J, K, F and C].

The Court of Appeals does admit the effects of the long established principles of *res judicata* and collateral estoppel, but neither considers its own district court's findings nor the details of prior adjudications. It does mention Judge Morgan's recognition that the claim had been resolved previously, but without a review of the record in Case No. 75 L 2893 to identify the claims that had been made therein that court rejected Judge Morgan's finding which had been based on Judge Iben's opinion in that case (App. J) as well as previous decisions in the state courts.

The finding of the Court of Appeals, that the state Case Number 75 L 2893 did not determine the same issues, is completely

undercut and made meaningless by the motion filed by the golf pros [App. I] in Case Number 76-14 (Case Number 75 L 2893 on appeal), that claimed:

> "The subject matter and decisions reflected by [the opinion of the Seventh Circuit] are directly connected with and relevant to the subject matter and issues pending . . . Furthermore, the opinion of the Circuit with regard to the employment terminations should be considered by [the Illinois Appellate Court] with regard to the judgment on review on the counterclaim involving the same subject matter . . ." [App. I]

Those representations, after the golf pros had claimed before the Court of Appeals that the cases involved separate issues, in order to avoid *res judicata*, are a perfect example of the vexatious pleadings used by the golf pros, which the state courts recognized and which eventually occasioned the injunction of further litigation in the state court. [App. K]

The comments of the Illinois Appellate Court in Case Number 76-14 are especially illuminating as to whether this federal action was barred by collateral estoppel:

> "The Seventh Circuit Court of Appeals held, *inter alia*, that the substance of Count 2 of [the golf pros'] federal complaint had not been previously disposed of by the judgment of the circuit court of Peoria County, contrary to what had been decided by the district court. The judgment of the circuit court of Peoria County referred to above is the same judgment which forms the basis of this appeal. Upon the motion of [the golf pros] we have allowed the opinion of the Seventh Circuit Court of Appeals to be cited as additional authority. . . . The Seventh Circuit found that Judge Iben had not disposed of the golf pros' claim or of critical facts pertinent to it . . . *From a review of [the golf pros'] brief in this cause of which the Circuit*

Court of Appeals was unaware, ALL the reasons why [the golf pros'] discharge could be considered wrongful were or could have been urged and resolved in the case before the circuit court of Peoria County." [emphasis added].

Additionally, the Petition for Rehearing *En Banc*, pointed out at page 7 that:

> "The terminations occurred before the complaint was ever filed [cite omitted] and the allegation that the termination occurred because [the golf pros] asserted defenses in a case not yet filed is absurd.";

and Judge Iben found:

> "[The golf pros] did not, moreover, avail themselves of their right to present any grievances to the District under procedures available." [App. J.]

(4) At page 6, the Court "assumes" as true the allegation that:

> "As a result of the [petitioners'] wrongful conduct the golfing public of Peoria is alleged to have lost the benefits of competition, suffered increased prices and all the evils of monopolistic practices without any corresponding governmental or other benefits."

Quite to the contrary, the "governmental benefits" are apparent from the record. The taxpayers, the public and the golfers have received $90,000 per year (or damages therefor, App. H and J) instead of $6,000 per year which was the most ever paid by the golf pros. In fact the golf pros themselves have been the real cause of injury to the public as stated in the order of the Illinois state court:

> "That the Golf Pros have used such allegations and misrepresentations to harass the Park Board by vexatious and

> harassing litigation on issues previously and finally adjudicated. . . . That the Park Board and the public has been and will continue to be irrevocably injured, suffering serious financial injury and inconvenience by such vexatious or harassing and continued litigation." [see App. K].

That finding was over two years ago and during the interim, the harassing litigation has merely moved from state to federal forums;

(5) At page 6, the Court notes that:

> "We intimate no views whatsoever on the likelihood that [the golf pros] will be able to prove the allegations of the Complaint."

That must be small consolation to the Illinois State Courts, at each level, which have considered, by hearing evidence and extensive legal arguments, identical allegations so many times as to justify enjoining further attempts to relitigate the possessory claims in the State Courts, an award of attorney's fees for harassment, and outright dismissals for attempts at relitigation too numerous to mention. A Court of Appeals has no right or perogative to "assume" as true allegations of that nature when those facts have been tried and adjudicated in state courts. To do so is contrary to our system of federalism with our notions of comity and mutual respect. But the Court of Appeals goes on to say that:

> ". . . the district court's judgment rests solely on the conclusion that the involvement of governmental action takes the case outside the scope of anti-trust laws. Without the benefit of a factual record, the district court's views or briefing by the parties, we decline to address any broader question than that upon which the district court rests its decision." [pages 6-7 of the opinion]

It may not violate any principal of comity or federalism for a Court of Appeals to misconstrue its own lower district court's

decision, but when reversing that lower court's decision because it properly followed the doctrines of full faith and credit, comity and *res judicata*, and the Court of Appeals refuses to follow those doctrines, then that decision is wrong. The fact is, as the district court properly noted that:

> "While there are some insignificant additions, basically the same operative facts are alleged in this Complaint as were alleged in Case No. P-CIV-74-11 filed January 22, 1974. . . . To the extent that the same issues are raised in this Complaint [the golf pros] are barred by principles of res judicata." [App. C].

Further, the Court of Appeals' claim that they were without "benefit of a factual record, the district court's views, or briefing by the parties" on the questions of *res judicata* and the problems of comity presented by that appeal is just another example of the Court's failure to give full faith and credit to the state court decisions. The Court's record, the district court's decision and past decisions, the parties' briefs, and the Petition for Rehearing each refer to the history of litigation involved between these parties. The refusal by the Court of Appeals to consider those facts, or to inquire further into that litigation history if they felt it necessary, cannot be excused on the pretext that the lower Court failed to evaluate it or that the record or the briefs of the parties failed to present the question.

(6) At page 7, the Court "assumes" as true the allegation that:

> "The threat of a monopolistic license to GSM and the demand for uniformly increased fees were used by the [petitioners] as means in a broader conspiracy to coerce [the golf pros] into raising and fixing their retail prices. . . ."

The judicial fact is that the only combination the golf pros entered was one to litigate [App. H] and the pros never were

awarded a contract from the Park District where they "raised or fixed their retail prices." The allegation "assumed" as true, even if it were provable, which several Courts have held it is not, amounts to a claim that Petitioners attempted to violate the antitrust laws, not that they ever did.[8] Yet that tenuous claim is used by the Court of Appeals to support its finding that the golf pros had stated a cause of action. In other words the assumption at once totally disregards the prior State Court reviews of the allegation and creates a cause of action for attempted violation of the antitrust laws. Both propositions are anathema to our legal system.

(7) At page 7, the Court of Appeals also "assumes" that:

> "The award of the GSM license was made to punish [the golf pros] for refusing so to be coerced."

Never does the Court admit that GSM may have been awarded the license because they were the highest competitive bidder, notwithstanding the repeated claims that Petitioners have made, nor the repeated findings of prior Courts, nor the Public Bidding Act of Illinois which says the highest responsible bidder must be awarded the license. But even more annoying is the claim of punishment. Nowhere in the history of the Sherman Act is there support for the proposition that there was legislative intent or statutory product to provide a remedy for illegal punishment. In fact there was no punishment ever alleged in the complaint. After negotiations failed the non-renewal of the contracts can't be equated with punishment.

(8) At page 11 *et seq.*, the Court of Appeals discusses the antitrust issues but consistently refuses to even recognize, that the identical claims were made before the State Courts in the

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[8] See also pages 13, 14, and 20 of the opinion where the Court continues to use language of an "attempt" seemingly willing to recognize that at most only an attempt could be alleged.

golf pros' affirmative defenses in Case Number 75 L 2893. All of those claims were dismissed by the trial court and the Appellate Court affirmed that dismissal [App. H and J]

(9) The only benefits derived from the Park District's contracts are public benefits and the electoral processes of Illinois provide the proper, and the only proper, means for questioning the soundness of those governmental acts. It should not go unmentioned that the golf pros have even tried that avenue, as indeed they should have, by running a slate of candidates against incumbent trustees on the platform that this "sham" contract was not in the public's interest. Needless to say the public was not moved to their point of view. Having lost at that attempt, the golf pros returned to Federal Court to "appeal" the decision of the electorate as well as the prior court decisions, and the Seventh Circuit Court of Appeals did not hesitate to interject their opinion, albeit admittedly without proper foundation, to reverse not only the prior Court decisions, but the decision of the public of Peoria.

(10) Finally, at page 18, the Court of Appeals asserts the most unwarranted claim of all, namely that:

> "If these allegations can be proved, and *we must assume at this point they can*, the *Noerr* doctrine would provide no defense." [Emphasis added]

The Court makes no meaningful statement as to why they must "assume" as true such allegations that have been repeatedly rejected or proved false by every State and Federal Court (more than 15 in number) which have considered them. In fact there is no reason why they must or should be taken as true and there are countless reasons why they must not be taken as such: the appropriate regard and respect for those past Court decisions, comity, full faith and credit; the well established principles of *res judicata* and collateral estoppel; the salutory principles of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); and *Juidice v. Vail*, — U.S. — (1977) that relitigation generates only confusion, waste of judicial time, and the potential for Federal-State conflicts; the presumption that properly constituted public bodies act in the best interest of the public and not with motivations challengeable only through baseless name calling and unsupportable insinuations; that State governments and their local units are vested with sovereign authority to act in ways which they decide promote the general health, safety and welfare of their public. The golf pros and the Court of Appeals for the Seventh Circuit have forged a direct attack on this Supreme Court's exclusive authority to review adjudications of State Courts and the doctrines of the Supreme Court as to comity and federalism so vital to the American system of government. The guiding principle, as this Court has repeatedly stated, is:

> "The notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Juidice v. Vail*, — U.S. — (1977), quoting from *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 601 (1975) which quoted from *Younger v. Harris*, 401 U.S. 37, 44 (1971).

For those reasons this Supreme Court is faced with a unique opportunity and necessity to review the acts of one of its lower federal courts which strikes at the heart of that judicial system.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 16, 1977

APPENDIX

APPENDIX A

Opinion by Judge Pell
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 26, 1977

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. James L. Foreman, District Judge*

William Kurek, et al.,
Plaintiffs-Appellants,

No. 76-1791 v.

Pleasure Driveway and Park District of Peoria, Illinois, etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Peoria Division
No. P-CIV-76-9
Robert D. Morgan, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Peoria Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED AND REMANDED IN PART, in accordance with the opinion of this court filed this date. Costs are to be awarded to appellants.

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* Honorable James L. Foreman, Judge, United States District Court for the Eastern District of Illinois, sitting by designation.

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1791

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES, and RICHARD HOADLEY,

Plaintiffs-Appellants,

v.

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, an Illinois political subdivision; GEORGE L. LUTHY, JOHN R. CANTERBURY, JAMES A. CUMMINGS, BONNIE W. NOBLE, CLYDE WEST, HAROLD A. (PETE) VONACHEN, JR., individually and as President and Members of the PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA; RHODELL E. OWENS, individually and as Director of Parks and Recreation; JACK M. FULLER, individually and as Administrative Assistant; DANIEL B. OHLEMILLER, individually and as Business Administrator; FRANK D. BORROR, individually and as Superintendent of Maintenance; WILLIAM McD. FREDERICK, individually and as Attorney of PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA; GOLF SHOP MANAGEMENT, INC., an Illinois corporation; and GORDON A. RAMSEY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.
No. P Civ. 76-9—**Robert D. Morgan**, *Judge.*

ARGUED JANUARY 20, 1977—DECIDED MAY 26, 1977

Before FAIRCHILD, *Chief Judge*, PELL, *Circuit Judge*, and FOREMAN, *District Judge*.*

PELL, *Circuit Judge*. The district court dismissed Count I of plaintiffs' complaint (alleging federal antitrust violations and invoking 15 U.S.C. §§ 1, 2, 15 and 26) on the authority of *Parker v. Brown*, 317 U.S. 341 (1943); and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and their progeny.[1] Count II of the complaint (alleging deprivations of federal rights under color of state law and invoking 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331(a) and 1343) was dismissed on the grounds that one defendant was not a "person" within the meaning of 42 U.S.C. § 1983 and that the remaining defendants were protected by a previous state court adjudication. This appeal followed.

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* District Judge James L. Foreman of the Eastern District of Illinois is sitting by designation.

[1] In its decision and order dismissing the complaint, the district court also denied plaintiffs' motion for partial summary judgment. The court's determination that no cause of action was alleged *a fortiori* precluded independent consideration of this motion. Although we reach a different conclusion on the sufficiency of plaintiffs' complaint, we see no reason to disturb the district court's denial of partial summary judgment. Plaintiffs did in their briefs cite freely to materials tendered in support of their summary judgment motion and requested reversal of the district court's denial of the motion, but they made no contention at oral argument that they were entitled to summary judgment on this record. Moreover, "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. . . . Trial by affidavit is no substitute for trial by jury . . . ." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (footnote omitted). We do not foreclose the possibility that summary judgment against or in favor of some or all of the defendants may eventually be justified, but we may say with confidence that the present record does not establish that all of the facts material to plaintiffs' complaint are uncontested.

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I

We assume, of course, the truth of the well-pleaded facts alleged in plaintiffs' complaint, which are, in material part, as follows: Plaintiffs are five golf professionals, accredited as such by the Professional Golfers' Association. Defendant Pleasure Driveway and Park District of Peoria (the Park District) is a unit of local government within the meaning of Article VII, § 1 of the Illinois Constitution, deriving its powers from various Illinois statutes which will be referred to hereinafter. The Park District owns and operates five municipal golf courses in Peoria, Illinois. Plaintiffs were, for varying periods aggregating 83 years, employed by the Park District to perform combined duties as golf course managers, greenskeepers, and golf professionals at the Park District's courses. Each plaintiff, while so employed, was granted a concession to operate a proprietary retail business (pro shop) selling golfing equipment at his golf course. In this proprietary function each plaintiff competed with each of the others, and between them they constituted the entire public market in Peoria for high quality "pro line" equipment. Eleven individual defendants are and at pertinent times were the President and members of the Park District's Board of Trustees, the Board Attorney, and administrative staff members of the Park District. Also defendants are Golf Shop Management, Inc., the current concessionaire of the pro shops at all five courses, and Gordon Ramsey, the concessionaire's sole incorporator. For present purposes, these last two defendants may be treated together (GSM).

On January 19, 1974, the Park District terminated plaintiffs' concession rights, and on February 20 of that year the Park District terminated plaintiffs' employment. On January 23, 1974, GSM was awarded pro shop concession rights at all of the Park District's five golf courses. The reasons for these events, and the manner in which they came about, are at the heart of this lawsuit.

The 1970 Illinois Constitution, Article IX, § 5, provided for the abolition of personal property taxes and authorized the Illinois General Assembly to provide replacement revenue sources for local government units.

The General Assembly has not exercised its power to create substitute revenues for local park districts. These facts, which we may and do judically notice, apparently led the Park District in 1973 to consider the possibilities of obtaining greater revenues from its golf course pro shop concessions.

Plaintiffs had, for some time, been paying small concession fees; each paid only $600 yearly, except for one who was assigned only a nine-hole golf course and who paid only $300. In the late summer and fall of 1973, the terms of the concession agreements for that calendar year were revised in a confusing and apparently less than harmonious series of negotiations, with the result that plaintiffs agreed to pay 1½% of their gross receipts as a fee.

Also during the fall of 1973, GSM and members of the Park District Board and Staff agreed that GSM would make an economically unrealistic "sham" proposal, which would not be performed, to pay $90,000 a year for concession rights at the five golf courses.[2] Public bidding specifications tailored exclusively for GSM's "sham" proposal were designed and advertised, and on December 17, 1973, GSM formalized its $90,000 proposal as a bid. A Park District Board meeting scheduled for December 19 for the purpose of acting on received bids was never held.

Instead, in the language of the complaint,

> [f]rom, and after, December 17, 1973, GSM's $90,000 per year proposal . . . was coercively laced with the threat of non-renewal of plaintiffs' 1973 "leases" and summary termination of their proprietary business rights and used to induce them to raise, fix and maintain their retail, rental and service prices and pay a 5% of gross concession or "lease" fee to the PARK DISTRICT.

[2] The plaintiffs do not explicitly allege an agreement or an understanding that GSM would not in fact pay an annual fee of $90,000. However, it is alleged that GSM would suffer net operating losses of at least $50,000 if it paid $90,000 yearly concession fees as promised. Also, the characterization of the proposal as being a "sham" would seem to imply a lack of bona fides insofar as an intent to carry out the terms and conditions of the proposal was concerned.

> [The Park District defendants] used the GSM proposal, with GSM agreement, to coerce plaintiffs into a 5% sales taxing and price raising/fixing scheme.
>
> . . . .
>
> On January 16, 1974 the PARK BOARD declared that unless plaintiffs agreed to raise their resale, rental and service prices and pay 5% of the gross receipts before 8 a.m., Saturday, January 19, 1974, their proprietary concession rights would be awarded to GSM, Inc.
>
> . . . .
>
> The plaintiffs and each of them were not summarily terminated from their proprietary business and local governmental employment rights because of the expiration of their 1973 "leases" but because, on January 19, 1974, they refused to be coercively induced into levying unlawful 5% sales tax levies on their business consumers and because they refused to contract, combine or conspire with the effect of raising, fixing and maintaining their proprietary resale, rental and service prices contrary to Illinois and Federal antitrust laws.

The complaint also alleges that plaintiffs, even after their proprietary terminations, remained in possession of the pro shops, that they litigated the Park District's state court forcible entry and detainer suit, and that this assertion of their "rights" was the cause of their employment terminations. The Illinois Appellate Court determined that plaintiffs' defenses in that suit were not germane to the narrow question of their right to possess the pro shops and that plaintiffs' rights of possession ended at the expiration of their concession agreements on December 31, 1973. *Pleasure Driveway and Park District of Peoria v. Kurek*, 27 Ill. App.3d 60, 325 N.E.2d 650 (1975). The Illinois Supreme Court denied leave to appeal. A subsequent state court damages action by the Park District sought redress for plaintiffs' allegedly wrongful holding over of possession of the pro shops, and a judgment in the Park District's favor in the amount of $127,605 is apparently pending on appeal.

As a result of the defendants' wrongful conduct, the golfing public of Peoria is alleged to have lost the benefits of competition, suffered increased prices and all of the evils of monopolistic practices without any corresponding governmental or other benefits. Substantial injury to plaintiffs is claimed. Count I (antitrust) seeks declaratory and injunctive relief against all defendants and treble damages from all defendants except the Park District. Count II (civil rights) seeks damages from all defendants except GSM.

II

We turn to the question of whether Count I of the complaint fails to allege a cause of action under the antitrust laws. The standard we must apply is settled beyond dispute: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This rule has particular force in this case, where plaintiffs' motion to amend their complaint by adding a third count, which refined their antitrust theories and made some additional factual allegations, was denied by the district judge in a short decision and order.[3]

Before considering the difficult questions which this case requires us to answer, we note briefly several background matters. First, of course, we intimate no views whatsoever on the likelihood that plaintiffs will be able to prove the allegations of the complaint.[4] Also, the district court's judgment rests solely on the conclusion

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[3]. The district judge characterized plaintiffs' motion as an attempt to relitigate "antitrust and constitutional violations which simply do not exist" and dismissed the possibility that a conspiracy existed as "pure fancy," although a conspiracy is plainly alleged both in the complaint he dismissed and in the amended complaint he denied leave to file.

[4] Nor do we consider the question of which, if any, of the asserted components of plaintiffs' damages will prove to be recoverable under the Supreme Court's recent decision in *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, ... U.S. ....., 45 U.S.L.W. 4138 (Jan. 25, 1977).

that the involvement of governmental action takes the case outside the scope of the antitrust laws. Without the benefit of a factual record, the district court's views, or briefing by the parties, we decline to address any broader question than that upon which the district court rested its decision.

Moreover, this case does not present the question of whether a public agency may grant a monopolistic concession license without violating the antitrust laws, where no more is alleged or proved. Nor does the case simply involve a public agency's attempt to increase operating revenues by increasing concession fees uniformly to its competing concession licensees. The case does involve both of these elements, the defendants urge us to decide the case as if it involved no more, and the district court, in dismissing the case, apparently accepted this characterization of the issues raised. But more than this is alleged by the complaint, which charges that the threat of a monopolistic license to GSM and the demand for uniformly increased fees were used by the defendants as means in a broader conspiracy to coerce plaintiffs into raising and fixing their retail prices and that the award of the GSM license was made to punish plaintiffs for refusing so to be coerced. Acts which may be legal and innocent in themselves, standing alone, lose that character when incorporated into a conspiracy to restrain trade. *See Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964); *Poller v. Columbia Broadcasting System, Inc., supra*, 368 U.S. at 468-69.

III

We must initially determine whether the district court correctly stated the law to be that the activities of the Park District are outside the scope of the Sherman Act, either as a general matter or, at least, in the circumstances of this case. The district court based its conclusion on the "so-called state-action exemption,"[5] *Gold-*

[5] As the opinions of the Supreme Court, considered herein, have recognized, *Parker* announced no rule of antitrust *exemption* or *immunity*; rather, it determined that the Sherman Act was not intended to apply in the first place to the type of state-mandated activities there at issue. Other courts nevertheless have utilized the single-word shorthand references of "exemption" or "immunity."

farb v. Virginia State Bar, 421 U.S. 773, 788 (1975), which was articulated in *Parker v. Brown, supra*, and its progeny.

In *Parker*, the state of California's program for prorating the state's raisin crop so as to reduce excess supply and stabilize prices, which program was found to be consistent with federal agricultural regulations and policy, was questioned as to its validity under the Sherman Act, 15 U.S.C. § 1 et seq. The defendants were some of those charged by law with operating the program. The Supreme Court, assuming that the program would violate the Act if it were implemented by private persons, concluded nonetheless that the Act was not intended to prohibit the prorate program, which

> derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

317 U.S. at 350-51. The anticompetitive effects of California's prorate program derived from "the state['s] command"; the state adopted, organized, and enforced the program "in the execution of a governmental policy." *Id.* at 352. This fact was repeatedly emphasized by the Court in its brief discussion of the antitrust issue, and in its conclusion: "The state . . ., as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.*

Goldfarb v. Virginia State Bar, supra, presented the question "whether a minimum fee schedule for lawyers published by the Fairfax County [Virginia] Bar Association and enforced by the Virginia State Bar," 421 U.S. at 775, violated § 1 of the Sherman Act, 15 U.S.C. § 1. Because the Virginia State Bar was "a state agency by law," *id.* at 790 (footnote omitted), the Supreme Court addressed the State Bar's claim, based on *Parker*, that the Sherman Act did not apply to it, and rejected the claim, without dissent. The Virginia legislature had empowered the Supreme Court of Virginia to regulate the practice of law and had authorized a role for the State Bar in that regulation as an administrative agency of the Supreme Court. The state Supreme Court had developed ethical rules for lawyers, and the State Bar was empowered to issue ethical opinions on the application of the rules. Two such opinions were an important part of the State Bar's role in enforcing minimum fee schedules.

An expansive reading of some of the language in *Parker* would have suggested that the Sherman Act could not be applied to the State Bar in these circumstances, but the Supreme Court took a closer look. Because no Virginia statute referred to lawyers' fees and the Supreme Court of Virginia had taken no action requiring the use of and adherence to minimum fee schedules, it could not be said that the anticompetitive effects of minimum fees were "compelled by direction of the State acting as a sovereign." *Id.* at 791. The State Bar, although it acted within the scope of its general powers, had "voluntarily joined in what [was] essentially a private anticompetitive activity," *id.* at 792, and was not executing the mandate of the state. The Court stated that the existence of sovereign compulsion was "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe" and there was, thus, no reason to take the matter any further. *Id.* at 790.

After the district court dismissed the present lawsuit, the Supreme Court decided *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), which also bears upon the issues in this case. In *Cantor*, an electric utility,

regulated by the state of Michigan, operated a program which provided "free" light bulbs to electricity customers, the costs of the program being covered by the utility's general electricity rates. An independent seller of light bulbs charged antitrust violations, and the utility defended on the theory, based on *Parker*, that the light bulb program was included in its rate tariff filed with and approved by the state Public Service Commission and that state law required it to follow the terms of the tariff as long as it was in effect. Six Justices agreed that summary judgment for the utility, based on *Parker*, had been improperly entered.[6]

Cantor, of course, did not present the precise question addressed in *Parker* and at issue here, for in *Parker* state officials executing a state program were the defendants while in *Cantor* a private party sought to rely on state law to insulate its conduct from antitrust liability. The considerations applicable to each case are necessarily less than identical. While the Court did not develop a single opinion expressing the views of a majority of its members, *see* note 6 *supra*, a majority did agree that analysis of a private party's state law defense requires consideration of whether it would be fair to subject a party to antitrust liability when he may have been caught between inconsistent commands of his state and federal sovereigns, and of factors akin to those used to determine whether federal agency regulation of a business produces an implied antitrust immunity.

In deciding *Cantor*, the Court majority emphasized the facts that no Michigan statutes purported to regulate the light bulb industry, that neither the Michigan legislature nor the Public Service Commission had ever specifically looked into the question of the desirability of a "free" light bulb program, and that other utilities regulated by the Commission did not have such a program. The Court majority concluded therefrom that the Commission's approval of the utility's

[6] Mr. Justice Stevens delivered the Court's opinion, joined in whole by Justices Brennan, White, and Marshall, and in substantial part by the Chief Justice. *Id.* at 603. Mr. Justice Blackmun concurred in the result. *Id.* at 605.

program did not "implement any statewide program relating to light bulbs" and that "the State's policy is neutral on the question whether a utility should, or should not, have such a program." 428 U.S. at 585. That conclusion was central to the Court's disposition of the case.

Because a private actor's state law defense is at least related to a governmental body's assertion of a "state action" defense, we think the *Cantor* Court's emphasis on the lack in that case of a "statewide program" or a state policy sheds some light on the present case. We also think that *Cantor*, read with *Goldfarb*, provides important general guidance on the question of what it means to find governmental action involved in the facts of an antitrust suit.

Cantor and *Goldfarb* demonstrate beyond serious questioning that the Supreme Court is not inclined any longer, if it ever was, to accept superficial and mechanical application of a *Parker*-based "rule" that antitrust inquiry ends upon such a finding of governmental actions or laws being involved. In the years after *Parker* and before *Goldfarb* and *Cantor*, there was a tendency in many of the reported decisions to apply *Parker* broadly and to use rather general language in so doing. For example, addressing the distinct question of whether persons may join together attempting to induce governmental action with anticompetitive effects, *see* part V of this opinion, *infra*, the Supreme Court stated as a building-block proposition that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra*, 365 U.S. at 136. In the same context, this court's opinion in *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 227 (7th Cir. 1975), used similarly broad language. Neither case involved a claim of governmental action violative of the Sherman Act, the facts of both cases were meaningfully different than those presented here, and we have, thus, no occasion to question whether the language used accurately stated the law as applied to those cases. We point out, however, that *Goldfarb* and *Cantor* undercut the validity of any such simple one-sentence "rule" as a general proposition.

We turn, then, to the instant complaint, and conclude that *Parker* and its progeny do not support the district court's dismissal thereof. The fact that the governmental body sued here is a park district, with substantially less than statewide jurisdiction, has significance. First, it is clear that subordinate units of government—notwithstanding that they derive their powers from a state—are not entitled to all of the federalistic deference that the state would receive. *See, e.g.*, in the area of the Eleventh Amendment to the Constitution, *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974). More specifically, where there are numerous subordinate units of government of a given type, each of the same status under state law, it is more difficult to say that the actions of any one of them are undertaken pursuant to "the state['s] command," *Parker, supra*, 317 U.S. at 352, or that "[t]he state . . ., as sovereign" imposed any anticompetitive restraints resulting from such actions. *Id. Goldfarb* established that Sherman Act suits against state agencies may be maintained unless the conduct challenged is "compelled by direction of the State acting as a sovereign," 421 U.S. at 791, and the numerosity and potential variety of practices of subordinate units of government may often suggest that "the State's policy is neutral" on any given practice and that there is no "statewide program" which would require the sort of comity-based respect evident in *Parker*. *See Cantor, supra*, 428 U.S. at 585.

We surely do not wish to be understood as saying that park districts and other subordinate governmental units may no longer avail themselves of a *Parker* defense to antitrust suits. Rather, we advert to the fact that a subordinate governmental unit's *Parker* claim is less obviously justified than is the same claim made by a state government, and we conclude that antitrust "immunity" in the former case cannot be automatic. Both the Third and the Fifth Circuits have recently so held. *City of Lafayette, Louisiana v. Louisiana Power & Light Company*, 532 F.2d 431 (5th Cir. 1976), *cert. granted*, ... U.S. ....., 45 U.S.L.W. 3647 (No. 76-864, March 28, 1977) (two cities); *Duke & Company Inc. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975) (three municipal corporations and a county commissioner); and *cf. Hecht v. Pro-Football, Inc.*,

444 F.2d 931 (D.C.Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (unincorporated instrumentality of the District of Columbia).

We realize that in the case of *State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363, 370 n.15 (9th Cir. 1974), involving antitrust counterclaims against a state and some of its political subdivisions, the Ninth Circuit has held to the contrary. *State of New Mexico* was, however, decided before *Goldfarb* and *Cantor* and we do not believe its holding as to subordinate units of government survives the test of their analysis. We simply see little sense in automatically treating as state mandates the activities of local governmental units when these activities may vary substantially from unit to unit and may be wholly lacking in any express or implied state authorization or command.

We agree with the Third and Fifth Circuits that an adequate state mandate for anticompetitive activities of subordinate governmental units "may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity." *Duke & Company Inc., supra*, 521 F.2d at 1280; *accord, City of LaFayette, supra*, 532 F.2d at 434-35. The latter case properly notes that "all evidence which might show the scope of legislative intent" should be considered. *Id.* at 435 (footnote omitted).

Nothing in the Illinois statutory provisions governing park districts even remotely suggests that Illinois has authorized, let alone compelled, park districts to attempt to enrich themselves by coercing horizontal retail competitors operating under concession licenses to fix retail prices in what would otherwise be plain violation of the Sherman Act. Park districts are, of course, empowered to "construct, equip and maintain . . . golf . . . courses," Ill. Rev. Stat. 1975, ch. 105, § 8-10, as well as "necessary facilities pertinent thereto . . . ." *Id.*, § 9.1-1. Power is also given for park districts "to contract in furtherance of any of [their] corporate purposes," *id.* § 8-1(a), and "to lease real estate," *id.*, § 8-16. We think these provisions fully authorize the Park District to operate pro shops at its golf courses or to make contracts or leases allowing outside parties to

operate such shops. If the complaint in this lawsuit alleged no more than that the Park District had substantially reduced relevant competition by operating the shops itself, foreclosing others,[7] or by determining that the "corporate purposes" of the District would be best served by contracting with a single concessionaire for the operation of the shops,[8] the case for a *Parker* defense would be stronger than it is here. That the Park District's conduct concerned its golf courses and involved its statutory powers to contract and/or to lease surely does not convert Illinois' grant of such powers into state authorization or mandate to use them to force private competitors to violate the antitrust laws.

This conclusion is strengthened by the complaint's allegations that the Park District, in demanding 5% of gross sales as a concession fee and requiring as a condition of concession renewal that plaintiffs raise and fix their prices, presumably to cover the 5% fee, was effectively attempting to impose on the Peoria golfing public a 5% hidden sales tax that is illegal under Illinois law. We note that the Park District's revenue powers are limited to the levying of various property taxes, Ill. Rev. Stat. 1975, ch. 105, § 6-1 et seq., and the charging of fees for the use of District facilities, *id.*, § 8-1(h), and we are aware of no authority that would authorize the Park District effectively to double the sales taxes currently in force in Illinois. If it can be proven that the concession fee's intended incidence would have operated as an illegal sales tax, it would be extremely difficult, if not impossible, to find a state mandate underlying the

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[7] *Ladue Local Lines, Inc. v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F.2d 131 (8th Cir. 1970); and *Continental Bus System, Inc. v. City of Dallas*, 386 F.Supp. 359 (N.D.Tex. 1974), both relied upon by defendants, are cases of this type.

[8] *E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947; and *Murdock v. City of Jacksonville, Florida*, 361 F. Supp. 1083 (M.D.Fla. 1973), fall into this category, and *Metro Cable Co., supra*, while distinguishable, is analogous. Although these cases and those cited in n. 7 *supra* were all decided before *Goldfarb* and *Cantor*, we may assume without deciding that the Sherman Act does not apply to these types of less-than-statewide governmental action.

Park District's alleged conduct.[9] For this reason and the others indicated, we believe the district court improperly dismissed the antitrust claim against the Park District.

IV

The analysis set out in part III of this opinion applies directly only to the Park District. In *Parker, supra*, and in some cases applying it, however, officials of governmental units were sued, as is the case here, and it has generally and sensibly been held that where the activities of a governmental unit are outside the scope of the antitrust laws, the officials charged with performing those activities enjoy the same protections. *See Parker, supra*, 317 U.S. at 350-51; *E. W. Wiggins Airways, Inc., supra*, 362 F.2d at 56; *Murdock v. City of Jacksonville, Florida, supra*, 361 F.Supp. at 1093-94. Even in such cases, however, it has sometimes been recognized that an official's actions ultra vires or in bad faith might present a different question. *Id.*

Neither in the district court nor in this court have the individual defendants associated with the Park District made any argument that they should be entitled to protection from antitrust liability even if the District was not. We see no *a priori* reason to determine, at this stage in the litigation, that such additional protection would or would not be justified. *See Duke & Company Inc., supra*, where the Third Circuit reversed a dismissal in favor of three municipal corporations *and* a county commissioner after determining that *Parker* did not protect the governmental unit defendants. Accordingly, we reverse the district court's judgment in favor of the individual Park District defendants. We do not mean to imply thereby that some or all of these defendants may not be able to establish some sort of good faith defense, for neither facts nor legal argument in support of such a defense are before us. Nor do we suggest, even if some sort of good faith defense might be cognizable in

[9] Such proof, of course, would add nothing directly to the merits of plaintiffs' antitrust claims and would be germane only to the question of state mandate.

appropriate cases, that proof in support of the complaint's allegations of bad faith and official actions illegal under state law might not operate to vitiate the defense in this case.

V

We turn to GSM's contention, accepted by the district court, that its involvement with the facts of this case was limited to seeking the award of a governmental contract and accepting its benefits and obligations once awarded, and that the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra*, and its progeny, protects GSM from antitrust liability. In *Noerr*, the Supreme Court held that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135. Three reasons for this rule were articulated. First, the Court found no Congressional purpose to regulate "political activity," and noted that an "essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act" counseled against construing the Act to apply to the former case. *Id.* at 136-37. Second, antitrust liability in such a case could reduce the flow of information on which governments depend and could, thus, impair their ability to take actions that operate to restrain competition, which ability was recognized in *Parker, supra*. *Id.* at 137. Third, "such a construction of the Sherman Act would raise important constitutional questions" because it would impute to Congress an intent to invade the First Amendment right of petition. *Id.* at 138. The Court recognized that Sherman Act liability might be justified where conduct "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ." *Id.* at 144. Because the *Noerr* defendants were "making a genuine effort to influence legislation and law enforcement practices," *id.*, no such argument was possible in that case.

Noerr was followed in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), where joint labor-management inducements to the Secretary of Labor and the Tennessee Valley Authority to take action injurious to small coal operators were involved. The Court stated that

> [j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

Id. at 670.

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court extended the *Noerr-Pennington* rule to attempts to influence administrative agencies and judicial proceedings. Because, however, the motor carrier defendants used universal resistance to competitors' applications for new operating authority to achieve their primary purpose of deterring the making of such applications, thereby injuring competitors not through governmental action but directly, the case was held to fall within Noerr's "sham" exception.

The district court accepted GSM's argument that its role in the case was solely that of the successful bidder for the Park District's pro shop concessions. We may assume arguendo that if the complaint alleged no more, GSM could not be found liable under the antitrust laws. We are inclined to the view that nonliability in such a case would flow from the fact that successful bidding does not violate the antitrust laws substantively, *cf. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975), rather than from the principles of *Noerr*, which seem to address a different question.[10] Perhaps

[10] *See Hecht v. Pro-Football, Inc., supra*, 444 F.2d at 940-42; and *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 32-34 (1st Cir. 1970), *cert. denied*, 400 U.S. 850, both of which take the position that the rationale of *Noerr* and progeny is directed to attempts to influence some significant governmental policy determination and not a government's actions as a commercial entity.

more to the point would be the decision of this court in *Metro Cable Co. v. CATV of Rockford, Inc., supra*, substantially relied upon by GSM, where defendant obtained the first granted cable television license in a city and successfully induced the city council not to license a potential competitor: this court found that *Noerr* and its progeny foreclosed antitrust liability.

Neither the successful bidder hypothetical nor *Metro Cable*, however, involve what is alleged here. The complaint asserts that GSM made an economically unrealistic "sham" proposal, not actually to be put into effect, in concert with at least some Park District officials, knowing that the proposal would not be acted upon as indicated in the bid invitation but would, instead, be used by the Park District to coerce plaintiffs into conduct violative of the antitrust laws. If these allegations can be proved, and we must assume at this point that they can, the *Noerr* doctrine would provide no defense. This is so for several reasons.

First, except for the fact that GSM's agreement and conduct were in conjunction with governmental officials it cannot be said that there is an "essential dissimilarity" of the sort that troubled the Court in *Noerr*, 365 U.S. at 136-37, between GSM's conduct and activities traditionally held violative of the Sherman Act. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), is illustrative.

In *Albrecht*, the defendant newspaper publisher had attempted to coerce plaintiff, one of its independent home delivery carriers, into compliance with a resale price fixing scheme violative of the Sherman Act. Defendant had argued, *inter alia*, that its actions, which included termination of the carrier, were wholly unilateral and did not establish any conspiracy or combination within the meaning of the Act. The Supreme Court disagreed, and overturned a jury verdict in defendant's favor because it was "clear that a combination in restraint of trade existed." *Id.* at 154. The only combination presented by the record and considered by the Court is quite like that which, as pertinent to GSM, is alleged here. Specifically, to put pressure on the plaintiff carrier, the defendant hired a subscription

solicitation company to seek customers from plaintiff's delivery route for a new route. Twenty-five percent of plaintiff's customers agreed to switch carriers. The defendant then gave these customers to another carrier who knew that he would have to follow defendant's resale price policies and that he might have to return the customers to plaintiff if plaintiff acceded to the policies. The defendant's combination with the solicitation company and the new carrier who lent their business efforts to defendant's attempts to coerce the plaintiff into an antitrust violation supported Sherman Act liability.[11] The parallel to this case is obvious, as is the conclusion that GSM's alleged conduct is not essentially dissimilar to activities the Sherman Act was meant to proscribe.

Nor is the fact that GSM combined or conspired with governmental officials dispositive, for both of *Noerr*'s premises with respect to that point are undercut by the factual setting of this case. Our determination that the Park District and its officials had no state mandate or authority to engage in the activities attacked here necessarily reduces the applicability of the reasoning of *Noerr* to the degree it is based on the need of governmental units for citizen input in making decisions that *Parker* holds to be outside the scope of the Sherman Act. *See Duke & Company Inc., supra*, 521 F.2d at 1282. The *Noerr* decision also rests on a refusal to impute to Congress an intent to invade the constitutional "right of the people . . . to petition the Government *for a redress of grievances*." U.S. CONST., Amendment I (emphasis added). We have some difficulty understanding how a contract proposal to a governmental unit falls within the ambit of that right, *see* note 10 *supra*, but even if it does, we think it clear that agreement with government officials to pressure others into an antitrust violation does not.

[11] Of course, only the newspaper publisher was sued in *Albrecht*, and it is at least possible that had the solicitation company and the new carrier been sued a defense based on their "insubstantial . . . connection with the restraint" might have been established. *See Goldfarb, supra*, 421 U.S. at 791 n. 21. On the present complaint, there is no occasion for us to decide if such a defense might be developed in subsequent proceedings here.

Alternatively, another basis for finding *Noerr* protections inapplicable at this stage of the proceedings is that facts provable under the complaint could well establish that GSM's concession proposal was a "mere sham" within the meaning of that decision. 365 U.S. at 144. We are not prepared to say that this conclusion would inexorably follow upon the sole proof that the proposal was economically unrealistic, *see Noerr, supra*, 365 U.S. at 140-42; *Metro Cable, supra*, 516 F.2d at 231; *but see Woods Exploration & Production Company, Inc. v. Aluminum Company of America*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), but the economically unrealistic nature of the proposal, alleged to have been known to Park District officials, might support an inference that GSM was not "making a genuine effort," *Noerr, supra*, 365 U.S. at 144, to obtain the concession rights but was instead lending its support to the Park District's attempted coercion of plaintiffs' pricing policies. The complaint is somewhat inconsistent in this regard, alleging as it does both that GSM's purpose was to obtain monopolistic concession rights and that GSM knowingly made its proposal to pressure plaintiffs into agreements which, if made, would have foreclosed the concession rights to GSM. Proof of the latter assertion, however, could establish a sham and take the case out of the *Noerr* doctrine even if that doctrine applied, which we have decided it does not.[12]

VI

Count II of the complaint alleges deprivations of the plaintiffs' civil rights under color of state law and is based on 42 U.S.C. § 1983. The district court dismissed Count II because, in its view, previous state court

[12] Defendants' suggestion that the "sham" exception operates only in a judicial setting is specious. The Supreme Court articulated the exception in the context of the *Noerr* facts, which in no way involved judicial settings. Nor does this court's determination in *Metro Cable, supra*, 516 F.2d at 228, that the existence of a judicial setting authorizes a somewhat broader inquiry into the "sham" issue even remotely support such a proposition.

decisions based on the same operative facts had resolved dispositive facts adversely to plaintiffs. On appeal, plaintiffs attack this dismissal only with respect to the complaint's charge that plaintiffs were summarily terminated from their public employment positions because they asserted their rights of petition and to due process by litigating their defenses to the Park District's forcible entry and detainer action. Moreover, plaintiffs agree that the Park District was properly dismissed out as a defendant even as to this charge. Accordingly, we affirm the district court's judgment insofar as it dismisses the other allegations in Count II and dismisses the Park District as a Count II defendant.

With regard to the employment termination claim against the President, trustees, attorney, and staff of the Park District, we must reverse. The district court based its dismissal of this claim on the following finding of Illinois Circuit Court Judge Iben in the Park District's damages lawsuit against the golf professionals:

> [T]he reason for their termination clearly appears to have been the Defendant's [sic] [plaintiffs herein] insistence on remaining in the golf shop premises. There is abundant evidence that they stubbornly and intractably insisted through litigation, and other ways, on this claim, spurning other avenues. They can have no doubt about the reason for their discharge, i.e., their refusal to give up the premises.

Pleasure Driveway and Park District of Peoria v. Kurek et al., No. 75 L 2893 (10th Judicial Circuit, Peoria County, Nov. 14, 1975). This finding was made with reference to the golf professionals' counterclaim allegation that their employments were summarily and unlawfully terminated.

We have no quarrel with the proposition that if Judge Iben's finding had disposed of the claim made here or had determined adversely to plaintiffs a fact critical to success on this claim, relitigation in the federal courts would be barred. *See Reich v. City of Freeport*, 527 F.2d 666 (7th Cir. 1975); *Phillips v. Shannon*, 445 F.2d 460 (7th Cir. 1971). The fact that the remaining defendants under Count II were not parties or privies in the state

court suit would, of course, make the doctrine of res judicata inapplicable, but it would not preclude defendants' defensive reliance on collateral estoppel. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

Nor would it matter that Judge Iben's decision has apparently been appealed,[13] for

> the federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as . . . collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo.

1B MOORE'S FEDERAL PRACTICE ¶ 0.416[3], at 2254 (2d ed. 1974); *Grantham v. McGraw-Edison Company*, 444 F.2d 210, 217 (7th Cir. 1971). Illinois follows the same rule. *Sixty-Third & Halsted Realty Co. v. Goldblatt Bros.*, 342 Ill. App. 389, 96 N.E.2d 838 (1951), *aff'd*, 410 Ill. 468, 102 N.E.2d 749.

We do not agree with the district court, however, that Judge Iben's finding disposed of plaintiffs' claim herein or of critical facts pertinent to it. Illinois' Forcible Entry and Detainer Act, Ill. Rev. Stat. 1975, ch. 57, § 1 et seq., plainly gives a tenant the right to remain in possession of property while litigating the question of his possessory rights. Judge Iben's determination that plaintiffs were terminated in their employments because they insisted on remaining in possession of the pro shops implies, to some extent at least, that the employment terminations occurred because plaintiffs chose to litigate their rights to possession. In fact, the finding expressly refers to plaintiffs' insistence "through litigation, and other ways" on asserting their claims to possession. Nothing in this state court judgment supports the district court's conclusion that it had been previously adjudicated that "the exercise of the right to litigate issues" was not the reason for plaintiffs' employment

[13] Our record does not reflect the pendency of an appeal in the state court case, but the brief of the defendants who seek to rely on the state judgment represents this to be the case, and we take that representation as a judicial admission of the fact.

discharges. No other issues pertinent to Count II of the complaint were decided below or asserted in this court, so we reverse the district court's judgment of dismissal insofar as it concerns the employment discharge claim against the individual Park District defendants.

For the reasons stated herein, the judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Plaintiffs have requested that the provisions of Circuit Rule 18 be applied on remand. We believe that the interests of justice would best be served, in the circumstances of this case, by granting that request. It is so ordered.

AFFIRMED IN PART;
REVERSED AND REMANDED IN PART.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 11, 1977

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. James L. Foreman, District Judge*

William Kurek, et al., Plaintiffs-Appellants, v. Pleasure Driveway and Park District of Peoria, Illinois, an Illinois Political Subdivision, et al., Defendants-Appellees. No. 76-1791	Appeal from the United States District Court for the Southern District of Illinois, Peoria Division No. P Civ. 76-9 Robert D. Morgan, Judge

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Pleasure Driveway and Park District of Peoria, Illinois, defendant-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* Honorable James L. Foreman, Judge, United States District Court for the Eastern District of Illinois, sitting by designation.

APPENDIX C

In the United States District Court
Southern District of Illinois
Northern Division

WILLIAM KUREK, et al.,
Plaintiffs,
v.
PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, et al.,
Defendants.
No. P-Civ-76-9.

DECISION AND ORDER

(Filed June 1, 1976)

This action is the latest step in a rather long history of litigation concerning the termination by defendant Park District of plaintiffs as golf course greenskeepers and as concessionaires in certain golf "pro shops." Plaintiffs are the former combination greenskeepers and golf professionals of the five municipal golf courses at Peoria, Illinois. The defendant Pleasure Driveway and Park District owns and operates the golf courses. Defendants Luthy, Canterbury, Cummings, Noble, West, and Vonachen all are or were elected members of the Board of Trustees of the Park District. Defendants Owens, Fuller, Ohlemiller, and Borror are officers of the Park District, and defendant Frederick is its attorney. Golf Shop Management, Inc. is the present single concessionaire at the golf courses, and Ramsey is a principal officer of Golf Shop Management. The defendants have moved to dismiss on several grounds. Plaintiffs have

filed verified motions in opposition to the motion to dismiss and for partial summary judgment, and, subsequent to hearing thereon, have filed supplemental affidavits.

History of Litigation

A summary of the prior litigation between the parties is necessary to fully understand the current status of the controversy. After discussions concerning proposed changes in their arrangements with plaintiffs, the Park District, on January 17, 1974, accepted a bid from Golf Shop Management to operate the concessions on all five municipal golf courses. In prior years, plaintiffs had operated the concessions pursuant to uniform written agreements which, by their terms, expired December 31, 1973. By letters to plaintiffs from the Park District, dated October 1, 1973, the concessions were terminated, effective December 31, 1973; but such letters specifically said that termination as greenskeepers was not intended.

Plaintiffs filed suit in this court (P-CIV-74-11) on January 22, 1974, alleging violations of antitrust and civil rights laws. On February 15, 1974, this court allowed defendants' motion to dismiss that case. Plaintiffs refused to surrender possession of the pro shops, and the Park District then filed a forcible entry and detainer action against the plaintiffs in an Illinois court on February 20, 1974. Plaintiffs were also discharged from their employment as greenskeepers at that time "because of your uncooperative attitude and total unresponsiveness to Park Staff and Board direction."[1]

Plaintiffs filed a counterclaim in the forcible entry and detainer action and ultimately received a jury verdict and judgment in their favor. In the meantime, plaintiffs were appealing the dismissal in this court. The United States Court of Appeals for

[1] Letters dated February 20, 1974, were served upon the plaintiffs by the Park District.

the Seventh Circuit agreed with the decision of this court with respect to matters actually decided, but remanded for a hearing on a motion to open, alter, or amend the judgment, noting that plaintiffs might have obtained some rights by the intervening judgment on jury verdict in the state court. That state court judgment, however, was reversed by the Third District Illinois Appellate Court on March 27, 1975, and that decision became final.

Golf Shop Management then entered into possession of the pro shops. On August 8, 1975, plaintiffs filed their own forcible entry complaint against Golf Shop Management. The complaint was dismissed and plaintiffs were enjoined from further litigation involving the possession of the pro shops, excepting money damages, and they were ordered to pay attorney fees to the Park District. Other motions by plaintiffs for relief to the Illinois Appellate Court and Illinois Supreme Court were also denied.

On June 25, 1975, the Park District filed an action for damages in the state court against plaintiffs for holding over possession of the pro shops after termination of their "leases." Plaintiffs here (defendants in that action) filed a counterclaim alleging that the Park District unlawfully terminated their employment as a greenskeepers. The Park District obtained a joint judgment for $127,605 in that action, and the "pros'" appeal therefrom is still pending.

On August 15, 1975, plaintiffs filed another suit in this court P-CIV-75-60) alleging that their rights to petition, to due process, and to equal protection of the law were violated by the state court proceedings. A motion to dismiss was allowed on the ground that the complaint sought to relitigate issues which had been finally determined in the courts of Illinois. Plaintiffs now bring the instant action alleging antitrust and civil rights violations somewhat more specifically.

Allegations of the Complaint

Plaintiffs' allegations, of course, must be taken as true for purposes of the motion to dismiss.

In summary, it is alleged that plaintiffs were employed as greenskeepers and, in addition, had "leases" to operate the golf course concessions, which included the right to sell "Pro Line" golf equipment. Negotiations were begun concerning the renewal of the leases for 1974; and the Park Board insisted upon an increase in concession rental revenues. Golf Shop Management submitted its bid (amounting to $90,000 more per year) on December 17, 1973, for all five courses. It is alleged that the existence of that bid was then coupled by defendants with a threat of final termination of plaintiffs' concession arrangements. On January 16, 1974, the Park Board informed plaintiffs that they had only until January 19, 1974 to accept a new concession contract requiring a rental equal to 5 percent of their gross receipts. Plaintiffs refused, stating that 5 percent of their gross receipts was prohibitive, and claiming that antitrust laws prevented them from entering into a contract having the effect of raising, fixing, and maintaining their retail, rental, and service prices.

It is further alleged that on January 23, 1974, the Park Board executed a concession agreement with Golf Shop Management, and that it agreed to indemnify Golf Shop Management for any loss due to obstructive litigation involving these plaintiffs. Plaintiffs assert that more than $215,000 of local governmental funds, credit, and property have been used to subsidize Golf Shop Management. They state that defendants Frederick, Owens, Fuller, Borror, Ohlemiller, Golf Shop Management, and Ramsey were the arch-conspirators of a plot to award Golf Shop Management the right to operate the pro shops. The alleged aim of the Park District employees was to induce tax levies contrary to the Illinois constitution in aid of

their own salaries, and in the case of the attorney, to conceal violations of Illinois local governmental appropriation laws. The aim of Golf Shop Management is said to have been to monopolize the Park District concession rights. The Park Board members are alleged to have been unwitting tools of the conspiracy through January 19, 1974, and thereafter it is asserted that they also conspired to conceal violations of local governmental appropriations laws. It was because of all this, it is alleged, that plaintiffs refused to release possession of the pro shops, the original forcible entry suit was brought, and plaintiffs were discharged from their employment as greenskeepers.

Declaratory and injunctive relief is sought against all of the defendants, and treble damages totaling almost 8 million dollars is claimed against all of the defendants except the Park District for antitrust violations in Count I. Count II seeks $2,627,605 in damages against all the defendants, except Golf Shop Management and Ramsey, for violation of plaintiffs' civil rights.

What plaintiffs apparently seek to allege in Count I is a scheme to fix local golf equipment prices by demanding excessive rent from the plaintiffs and, alternatively, a plot to obtain the exclusive and therefore monopolistic concession rights on Park District golf courses for the benefit of Golf Shop Management. Also alleged in Count II is violation of plaintiffs' federally protected civil rights by defendants acting under color of local governmental authority. More particularly, under the circumstances alleged, the termination of the concession rights is claimed to violate the Just Compensation and Due Process Clauses of the Fifth and Fourteenth Amendments, and termination of employment as greenskeepers is alleged to violate the Petition Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

COUNT I

While there are some insignificant additions, basically the same operative facts are alleged in this complaint as were alleged in case number P-CIV-74-11 filed January 22, 1974. The court dismissed that complaint for failure to state a claim upon which relief could be granted. The Seventh Circuit Court of Appeals remanded, to enable this court to pass upon a motion to open, alter, or amend; but the Appeals Court agreed that **Parker v. Brown,** 317 U.S. 341 (1943), would exempt defendants from any apparent cause of action for antitrust violation.[2] To the extent that the same issues are raised in this complaint, plaintiffs are barred by principles of res judicata. However, since the date of the earlier unpublished order of the Court of Appeals, the Supreme Court of the United States and the Court of Appeals for the Seventh Circuit have both issued opinions further explaining the governmental exemption of **Parker.** This complaint will be considered in the light of those principles.

The Supreme Court created the governmental action exemption from the Sherman Act in **Parker v. Brown,** *supra*. Restraint of trade that is otherwise violative of the Sherman Act does not create a cause of action if the anticompetitive activity is the result of valid governmental action. The question of possible agency involvement in any conspiracy to restrain trade was reserved. 317 U.S. at 351, 352. The California farm products marketing program in **Parker** was held to be exempt from Sherman Act proscription because the state legislature commanded the implementation of the program. 317 U.S. at 350. **Parker** was expanded in **Eastern Railroad Conference v. Noerr Motor Freight, Inc.,** 365 U.S. 127 (1961), to exempt concerted effort to induce or to influence public officials to pass or enforce laws. **Noerr** involved an attempt by several railroads to

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[2] Plaintiffs were later permitted to dismiss that case without prejudice.

persuade and induce legislative and executive action against long haul truckers. The holding was based on the **Parker** exemption and the First Amendment right to petition the government. The Court limited its holding to genuine efforts to influence governmental action, and specifically refused to immunize "attempts to interfere directly with the business relationships of a competitor," where the efforts to persuade government appeared to be a mere "sham." 365 U.S. at 144. The **Noerr** rule was further developed by **United Mine Workers of America v. Pennington,** 381 U.S. 657 (1965), where the Court immunized efforts to influence public officials even though the efforts were part of a broader scheme violative of the Sherman Act. **Parker** and **Noerr-Pennington** doctrine form the framework of the governmental action exemption.

The Supreme Court applied the developed **Parker** principle to a minimum fee schedule established by a local bar association in **Goldfarb v. Virginia State Bar,** 421 U.S. 773 (1975). The initial inquiry was stated to be whether the activity alleged to be anticompetitive is required by the state acting as sovereign. 421 U.S. at 790. The Virginia Supreme Court Rules stated that county bar fee schedules were to provide some guidance in setting fees, but did not require strict adherence. Because the State of Virginia did not require the anticompetitive activity of following minimum fee schedules, the governmental action exemption was held not available to the defendants.

The Court of Appeals for the Seventh Circuit applied the **Parker** and **Noerr-Pennington** doctrines to facts quite similar to the case at bar in **Metro Cable Co. v. CATV of Rockford, Inc.,** 516 F.2d 220 (1975). There, an unsuccessful applicant for a city cable television franchise brought a Sherman action against the successful applicant, its owner, the owner's officers, the mayor of the city, and one alderman. The successful applicant was alleged to have persuaded the city council to award the cable franchise to it and to deny a hearing to the plaintiff on

plaintiff's application. The actions of the city council in granting a franchise to CATV and not to Metro were held not violative of the Sherman Act under **Parker,** even though CATV was given a monopoly thereby and Metro was prevented from competing. The concerted efforts of the applicant and its agents to induce governmental action were held immune under **Noerr,** even though there might have been an anticompetitive purpose and effort as alleged by Metro. 516 F.2d at 228. The "sham" exception referred to in **Noerr** was inapplicable because the injury to Metro was caused by governmental action which CATV genuinely and successfully attempted to induce the city council to take. The mayor and alderman were also held immune, despite allegations that they accepted campaign contributions in return for their support. **Noerr** was held to provide antitrust immunity to governmental actions even when officials act in their own self interest. 516 F.2d at 230.

The Park District is alleged as a conspirator here to the extent that the Board of Trustees was persuaded to award the concession contract to Golf Shop Management and to the exclusion of the plaintiffs. The Park District is empowered by law ". . . to construct, equip and maintain . . . golf . . . courses . . . ." Ill. Rev. Stat. ch. 105, § 8-10. The award of a concession contract as an adjunct to operation of the golf courses is clearly exempted by **Parker** and its progeny. This is not a case where the public entity is alleged to have become a participant in a private agreement or combination by others for restraint of trade. **See Parker,** *supra* at 351, 352. Nor is it a case like **Whitten v. Paddock Pool Builders, Inc.,** 424 F.2d 25 (1st Cir. 1975), where a competitive bidding statute evidenced the state policy in favor of competition. The Park District is not required to obtain competitive bids for services of individuals, such as golf pros, possessing a high degree of professional skills. Ill. Rev. Stat. ch. 105, § 8-1(c). The Park District, nevertheless, did request bids before awarding the Gof Shop Management contract to the highest bidder. It did not discriminate against certain ap-

plicants, as it was alleged the defendants did in **Duke & Company, Inc. v. Foerster**, 521 F.2d 1277 (3d Cir. 1975). In fact, plaintiffs declined an offer of rent as a percentage of sales, which it might be argued tended to discriminate in their favor.

The Park Board and Park District officers and attorney are alleged to have conspired to award the concession rights to Golf Shop Management and to raise concession rents. Their alleged aim was to induce illegal tax levies and to conceal violations of local governmental appropriation laws for their own benefit, or for the personal benefit of some of them. Whatever laws such a breach of fiduciary duty might violate, if true, the federal antitrust laws are not among them. **Metro Cable,** *supra.*

Golf Shop Management, through Ramsey as its executive officer, was the successful bidder on the concession contract. Their conduct in inducing the award of the contract is within the protection of the **Noerr-Pennington** rule as well. Their actions were alleged to have been aimed at acquiring the concession contract for their own business advantage. There is no allegation of injury caused other than by governmental action, which Golf Shop Management and Ramsey successfully attempted to induce the Park District to take. There is no basis for suggestion of any possible applicability of the "sham" exception to the **Noerr-Pennington** doctrine.

COUNT II

Jurisdiction of the civil rights claim is alleged under 28 U.S.C. § 1331(a) as to the Park District, and under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 as to the individual trustees and officers. While the court does have subject matter jurisdiction of the claim against each defendant. there is substantial question as to the existence of any cause of action against the Park District. The Park District is not a person within 42 U.S.C. § 1983;

therefore, the First and Fifth Amendments must directly supply a protected right for an action for damages to exist. The Fourth Amendment has been held to create an action for damages for wrongful police action, **Bivens v. Six Unknown Named Agents,** 403 U.S. 388 (1971); but the Supreme Court has not yet considered whether either the First or Fifth Amendment creates that type of action. A few lower federal courts are divided on the issue.[3]

The court need not decide whether a cause of action exists against the Park District, however, because the court considers any civil rights claim based on these operative facts barred by previous state court decisions. As to plaintiffs' contention that the termination of the concession rights violated their Fifth Amendment rights, the Illinois Appellate Court held that, as a matter of law, plaintiffs' rights to possession of the pro shops under the concession agreements terminated on December 31, 1973. **Pleasure Driveway and Park District v. Kurek,** 27 Ill. App.3d 60 (3d Dist. 1975). As to plaintiff's contention that termination of their employment as greenskeepers, because they undertook to litigate their claim of rightful possession of the pro shops, violated the Petition Clause of the First Amendment, Judge Iben of the Tenth Judicial Circuit of Illinois found that the reason for their discharge was not the exercise of the right to litigate issues, but, rather, their insistence on holding over in possession of the pro shops after the termination of their "leases," to the detriment of the Park District. The right to litigate does not carry with it a right to lose with impunity.

When the issues in the state proceedings are substantially identical and are decided on the merits, subsequent civil rights claims are barred. **Phillips v. Shannon,** 445 F.2d 460 (7th Cir. 1971). The issues which plaintiffs seek to litigate here were

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[3] **See Greenya v. George Washington,** 512 F.2d 556, 562, n. 13 (D.C. Cir. 1975), for cases recognizing the cause of action and for cases contra.

previously adjudicated on the merits, and defendants' motion to dismiss must be allowed as to Count II.

Accordingly, IT IS ORDERED that plaintiffs' motion in opposition to the motion to dismiss and for partial summary judgment is DENIED.

IT IS FURTHER ORDERED that defendants' motion to dismiss is ALLOWED and the case is DISMISSED with prejudice.

/s/ ROBERT D. MORGAN
United States District Judge

Entered: June 1, 1976

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued January 16, 1975

January 23, 1975.

Before

Hon. Tom C. Clark, Associate Justice (Retired)*

Hon. John S. Hastings, Senior Judge

Hon. John Paul Stevens, Circuit Judge

"Unpublished Order" Not to be cited, per Circuit Rule 28

(Filed January 27, 1975)

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones and Richard Hoadley,
Plaintiffs-Appellants,
No. 74-1342 vs.
Pleasure Driveway and Park District of Peoria, Illinois, an Illinois Political Subdivision; George L. Luthy, President, and John R. Canterbury, James A. Cummings, Irene Branson, Bonnie W. Noble, Clyde West, Harold A. (Pete) Vonachen, Jr., Individually and as President and Members of the Board of Trustees of the Pleasure Driveway and Park District of Peoria: Rhodell E. Owens, Individually and as Director of Parks and Recreation; Jack M. Fuller, Individually and as Administrative Assistant; Daniel B. Ohlemiller, Individually and as Business Administrator; Frank D. Borror, Individually and as Superintendent of Maintenance; William McD. Frederick, Individually and as Attorney of Pleasure Driveway and Park District of Peoria; Golf Shop Management, Inc., an Illinois Corporation; Gordon A. Ramsey and Richard H. Parsons,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Northern Division.
No. P Civ 74 11
Robert D. Morgan, Judge.

Order

Plaintiffs, five pro-greenskeepers at the public golf courses operated by defendant Pleasure Driveway and Park District of

Peoria, Illinois, appeal from the district court's dismissal with prejudice of their Complaint, alleging a deprivation of property without due process of law or just compensation and a violation of the federal antitrust laws, for failure to state a claim upon which relief can be granted within the subject matter jurisdiction of the federal courts. For the following reasons, we vacate the judgment entered below and remand.

We agree with the district court's determination that plaintiffs, in their original Complaint, failed to allege facts sufficient to demonstrate that their continued operation of the golf course pro shop concessions amounted to a property interest protected by the Fourteenth Amendment rather than a mere "unilateral expectation." **Board of Regents of State Colleges v. Roth,** 408 U.S. 564, 577. Similarly, under **Parker v. Brown,** 317 U.S. 341 and its progeny, we cannot read Count II of the Complaint as stating a cause of action under the federal antitrust laws.

In their Motion to Open, Alter or Amend Judgment, filed on February 25, 1974, in the district court, and apparently not ruled on by the district judge, plaintiffs alleged:

> 10. • • •
>
> (a) That the plaintiffs have been employees and independent contractors of the Park District for more than 85 years and on or about October 1, 1973, **each had proprietary contracts providing explicitly and implicitly for leases through and beyond December 31, 1974.** (Emphasis added.)

Attorney for plaintiffs made a similar representation orally to the district court during consideration of his motion for a temporary restraining order. **See** Transcript of Proceedings on January 22, 1974, at 10 (R. 100).

Furthermore, the parties have informed us at oral argument that the plaintiffs have prevailed in a forcible entry and detainer

action brought against them by the Park District in Illinois state court; they apparently convinced the circuit court jury that they were entitled to continued occupancy of the golf pro shops. The Park District has appealed from that judgment.

We do not know what action the district judge would have taken on the Motion to Open, Alter or Amend Judgment if he had had an opportunity to rule on that motion before notice of appeal was filed. Although the motion was filed within 10 days after entry of the judgment, we do not know whether or not service was timely within the meaning of Fed. R. Civ. P. 59(e), nor, obviously, are we in any position to express any opinion on the sufficiency of any amended pleading which plaintiffs might tender to the court. However, in view of the fact that the record before us does indicate that plaintiffs might be able to make allegations describing an interest in property, and in view of the further fact that the district court's order was apparently predicated in part on their failure to do so in the original complaint, it seems appropriate to vacate the district court's order and remand the case for the purpose of giving the district judge an opportunity to rule on the foregoing Motion to Open, Alter or Amend Judgment. We, of course, indicate no views on the possible sufficiency of any amended pleading, or the appropriate disposition of the foregoing motion.

Accordingly, the judgment of dismissal with prejudice is vacated and the case is remanded for further proceedings.

APPENDIX E

In the United States District Court
Southern District of Illinois
Northern Division

William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones, and Richard Hoadley,

Plaintiffs,

v.

Pleasure Driveway and Park District of Peoria, Illinois, an Illinois Political Subdivision; George L. Luthy, President, and John R. Canterbury, James A. Cummings, Irene Branson, Bonnie W. Noble, Clyde West, Harold A. (Pete) Vonachen, Jr., Individually and as President and Members of the Board of Trustees of the Pleasure Driveway and Park District of Peoria; Rhodell E. Owens, Individually and as Director of Parks and Recreation; Jack M. Fuller, Individually and as Administrative Assistant; Daniel B. Ohlemiller, Individually and as Business Administrator; Frank D. Borror, Individually and as Superintendent of Maintenance; William McD. Frederick, Individually and as Attorney of Pleasure Driveway and Park District of Peoria [Golf Shop Management, Inc., an Illinois Corporation; Gordon A. Ramsey, Richard H. Parsons and Norman Hapertepe],

Defendants.

No. P-CIV-74-11.

DECISION AND ORDER

(Filed February 13, 1974)

The Complaint herein undertakes to state several federal and state causes of action on behalf of five former golf shop concessionaires who had contracts with defendant park district, a special public municipal corporation existing under Illinois law to levy taxes and to own, maintain and operate public parks and recreation facilities within a fixed area in Central Illinois. The other defendants are the elected members and officers of the board of the park district, its Director of Parks and other staff members, its legal counsel, and a corporate replacement concessionaire, along with the principals of that corporation. Defendant Parsons files an affidavit that he has acted as attorney and registered agent only of said corporation. The supposed federal causes of action are stated to be violations of plaintiffs' civil rights under color of state law (42 U.S.C. § 1983) and violation of the federal antitrust laws (15 U.S.C. §§ 1 and 2). Presumably, under supposed pendent jurisdiction, this court is also asked to find violation of antitrust laws of the State of Illinois and to adjudicate or reform former contracts so as to find them remaining in effect.

The park district and its people have filed one motion and the new concessionaire and its people have filed another, both under Rule 12(b)(1) and (6), F.R.Civ.P., on the ground that the Complaint shows on its face that there is no federal jurisdiction over the subject matter and that the Complaint states no claim upon which relief can be granted.

Upon careful consideration of said motions and the Complaint, this court is fully satisfied that these motions must be allowed and that the Complaint must be dismissed.

While, normally, amendment would be allowed as a matter of course on dismissal of a complaint, this court can conceive

no basis whatsoever for federal jurisdiction over the general subject matter set forth in this complaint between the parties here involved; hence, no case here to which possible state causes of action could append, and consequently no justification for further proceedings here. Accordingly, this dismissal is final and with prejudice, in order that any desired proceedings elsewhere need not be delayed or further encumbered here.

Accordingly, It Is Ordered that the motions to dismiss on behalf of all defendants are Allowed and the action is Dismissed with prejudice.

/s/ Robert D. Morgan
United States District Judge

Entered: Feb. 15, 1974

APPENDIX F

In the United States District Court for the
Southern District of Illinois
Northern Division

William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones, and Richard Hoadley, Plaintiffs, vs. Pleasure Driveway and Park District of Peoria, Illinois, a Special Unit of Illinois Local Government; et al., Defendants.	No. P-CIV. 75-0060

ORDER

(Filed September 19, 1975)

This matter coming on to be heard upon the Defendants' Motions to Dismiss, and the Plaintiffs and the Defendants being present by their attorneys of record, and the Court having heard the arguments of counsel, and being fully advised;

The Court Finds, that it has no original jurisdiction to review the decision rendered in the state courts, and that the Plaintiffs' procedure, if any, was to appeal to the U. S. Supreme Court from the state courts' decisions and orders.

It Is Therefore Ordered, that the Defendants' Motions to Dismiss be and the same are hereby allowed, and the Plaintiffs' complaint be and the same is hereby dismissed, with prejudice.

Dated: Sept. 19, 1975, *nunc pro tunc* Sept. 15, 1975.

Robt. Morgan
Judge

In the United States District Court
Southern District of Illinois
Northern Division

William Kurek, et al., Plaintiffs, v. Pleasure Driveway and Park District of Peoria, Illinois, et al., Defendants.	No. P-CIV-74-11 and No. P-CIV-75-60

ORDER ON MOTIONS

(Filed Sept. 30, 1975)

Both cases bearing the above numbers are between essentially the same persons, although there has apparently been some succession in office among defendant members of the "Park Board." Case Number P-CIV-74-11 was dismissed without prejudice on plaintiffs' own motion on May 2, 1975. Their motion for "relief" from that order, under Rule 60(b), F.R.Civ.P., is so ridiculous as to raise grave doubts of the bona fides of their position, and their contentions of "fraud" in legal argumentation strongly suggest wanton harassment. That case has been closed at plaintiffs' request for almost six months, and will remain so.

Plaintiffs' Complaint filed in Case Number P-CIV-75-60 on August 15, 1975, sought an injunction to restrain further proceedings in Illinois courts, judgment declaring an Illinois statute unconstitutional, as applied by the Illinois courts in a suit against plaintiffs, judgments declaring defendants "liable to plaintiffs," and such other relief as may be just. It was dismissed on motions

of the defendants on September 15, 1975 (written order filed September 19, 1975), on the ground that it sought to relitigate here contentions on federal rights which had been submitted to, and decided by, the courts of Illinois. This court held that the route for such federal review was to the United States Supreme Court from the Illinois Supreme Court, and not by an action in federal district court. The present motions asks, under Rule 59, F.R.Civ.P., that the dismissal order be "altered or amended" to grant plaintiffs leave to file, on or before October 6, 1975, an amendment to the Complaint, to include new Counts II and III, which are not tendered with the motion, but which are generally indicated, by references to the statutes, to involve supposed violation of federal civil rights of plaintiffs by defendants under color of state law and relief from conspiracy in restraint of trade and monopoly.

It is stated, in support of the latter instant motion, that plaintiffs do not intend to appeal the dismissal decision herein "unless it be necessary to effectuate their right to amend." While there are some five pages of assertions and argumentative material included in said motion, no ground is apparent for making any such supposed causes of action further counts in this suit which has been closed, rather than a separate action which could stand or fall on its own allegations. This court would not desire to delay or discourage appeal, if it is believed that any prior decision is erroneous.

It appears to this court that any federal cause of action which now is believed by plaintiffs to exist, apart from an effort to have this court review or alter the effect of the basic state court judgment, should be alleged in a new complaint in a new action, so that the allegations thereof under Rule 8 may be tested as to sufficiency as matters of law, uncluttered with items of supposed proof; and it found sufficient, the defendants will be able to admit or deny to raise any issues for trial, as contemplated by the Federal Rules of Civil Procedure. Plaintiffs should bear

carefully in mind, however, that this suggestion is in no sense an invitation to relitigate any issue previously decided between the parties, here or in the courts of Illinois, and that any effort to do so will call for the imposition of sanctions for vexatious pleading.

Accordingly, IT IS ORDERED that the plaintiffs' Motion for Relief Under Rule 60(b), in Case Number P-CIV-74-11, and the Motion to Alter or Amend, in Case Number P-CIV-75-60, are DENIED.

Robert D. Morgan
United States District Judge

APPENDIX G

State of Illinois
(Seal)
Appellate Court Third District
Ottawa

74-127

Pleasure Driveway and Park District of Peoria, Peoria, Illinois, an Illinois Political Sub-division

vs.

William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones, and Richard Hoadley

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy-five within and for the Third District of Illinois:

Present—

Hon. Allan L. Stouder, Presiding Justice

Hon. Albert Scott, Justice

*Hon. Richard Stengel, Justice
John E. Hall, Clerk
James A. Callahan, Sheriff

Be It Remembered, that afterwards on March 27, 1975 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

No. 74-127

Pleasure Driveway and Park District of Peoria, Peoria, Illinois, an Illinois Political Subdivision, Plaintiff-Appellant, vs. William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones and Richard Hoadley, Defendants-Appellees.	Appeal from the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County.

Honorable Robert A. Coney, Judge Presiding

Mr. Justice Stengel delivered the opinion of the Court: Publish in Full.

The Peoria Park District (plaintiff) brought a forcible entry and detainer action against five golf professionals (defendants) for possession of the golf concession shops at the five public golf courses owned by plaintiff. Defendants filed an amended answer, affirmative defense and counterclaim. Following a three week jury trial, a verdict and judgment were entered on April 23, 1974, in favor of defendants. Plaintiff's post trial motion was denied, and on May 6, 1974, a judgment order was entered which gave defendants possession of the premises and granted additional injunctive relief to defendants to enforce their employment and concession contracts. Plaintiff appeals from the judgment orders entered on April 23 and May 6, and from the order denying their post trial motion.

The dispute which gave rise to this litigation originated in negotiations for concession agreements for the year 1973 between the Peoria Park District and the golf pros who operate the pro shops and who were employed as greenskeepers at the

five golf courses owned by the Park District. It is not disputed that since 1959 the concession agreements had provided for a one year term ending December 31st of each year with a fixed fee or rent paid to the park district.[1]

During 1972 the Park Board proposed that the rental fee for 1973 be changed to 1½% of gross receipts. After prolonged discussions failed to produce an agreement, the golf pros retained an attorney in July of 1973 and authorized him to negotiate contracts in their behalf.

During further negotiations the Park Board refused to accept a rental fee of 5% of net income, but finally, on Sept. 12, 1973, offered to accept 1½% of gross receipts for 1973 and 1974 on the condition that the contracts were signed and returned by Sept. 20. Later the deadline was extended to 4:30 p.m. October 2. The golf pros signed contracts on Oct. 1, 1973, with four of the contracts providing for a term from Jan. 1, 1973, to Dec. 31, 1974, and gave the contracts to their attorney who did not deliver them.[2] On Oct. 3, notices of termination of the concession contracts effective Dec. 31, 1973, were given to four of the golf pros. At an Oct. 10 meeting the Park Board voted to refuse the two year contracts and to accept one year contracts at 1½% of gross receipts, provided the signed contracts were delivered the next day. On Oct. 11 the attorney for the golf pros approved the change in the termination date to Dec. 31, 1973, in the four contracts in his possession and delivered them to the Park Board. The agreements were signed on behalf of the Park Board the same day.

In November of 1973 negotiations commenced between the Park Board and the golf pros for the 1974 contracts, and the

[1] For 1972, the annual rental fee paid by four of the defendants was $600 each and by one defendant, $300.

[2] One defendant, Kurek, personally returned his contract to the Park Board on Oct. 2. This contract was originally drawn with a Dec. 31, 1973, expiration date.

Park Board also prepared bid specifications for concession rights for 1974. Having failed to reach agreement with the defendants, the Park Board on Jan. 19, 1974, awarded a three year contract for concession rights to Golf Shop Management, Inc. (GSM), with the stated intention of continuing defendants' employment as greenskeepers.

On Jan. 21, 1974, each of the five golf pros were served with a 30-day notice to terminate tenancy of the premises occupied by the concession shops, and on Feb. 20, 1974, the Park District filed its complaint in this cause to recover possession of the five golf pro shops at its golf courses.[3] On the same date the Park Board terminated the employment of the golf pros as greenskeepers.

The record of the proceedings in the circuit court is replete with motions, orders and pleadings, and no useful purpose would be served by attempting to summarize all of the various pre-trial procedures and rulings in this case. Included among the rulings of the circuit court were a denial of plaintiff's motion for summary judgment, dismissal of defendants' third party complaint against GSM, severance of defendants' original counterclaim for purposes of trial, and denial of plaintiff's motion to dismiss defendants' amended affirmative defenses and counterclaim.[4]

The complaint sought to recover possession of the pro shops on the ground that the leases expired Dec. 31, 1973. The defendants in their answer denied the expiration date and also

[3] On Jan. 22, 1974, the five golf pros filed suit in the U.S. District Court for the Southern District of Illinois, Northern Division, seeking declaratory and injunctive relief for alleged deprivation of property without due process of law or just compensation, and for an alleged violation of federal antitrust laws. The complaint was dismissed with prejudice, and, on appeal, the dismissal was affirmed but the case was remanded for consideration of the golf pros Motion to Open, Alter or Amend Judgment, which motion is still pending.

[4] Affirmative defenses filed by defendants were withdrawn at the close of all the evidence.

denied that the concession agreements were the sole basis of possession, and, in their counterclaim asserted that their employment as greenskeepers was so inter-related with the concession agreements as to form one contract; that the discharge of defendants from their employment on Feb. 20, 1974, amounted to forcible entry upon defendants' possessory rights; and that erecting tents on the five golf courses trespassed on defendants' possessory rights (apparently the plaintiff erected tents for use by GSM for selling admissions and renting golf carts during 1974). Defendants' counterclaim also alleged that certain other acts of plaintiff, such as issuing press releases, constituted forcible entry, but such assertions were so obviously frivolous that we will not consider them here.

The cause proceeded to trial before a jury which returned a verdict for defendants on both the complaint and counterclaim and also returned the following answers to special interrogatories:

> "Do you find that the Plaintiff entered upon defendants' premises with force and thereby interfered with their rights of possession?
>
> Answer . . . Yes.
>
> "Do you find that the Plaintiff and Defendants entered into an agreement which expired or terminated December 31, 1973?
>
> Answer . . . No."

Plaintiff's post trial motion was denied, and on May 6, 1974, the court entered an order which granted defendants possession of the golf pro shops, enjoined plaintiff from interfering with operation of the golf courses, restored defendants to their employment as greenskeepers, granted defendants exclusive operation of the pro shops and golf courses, enjoined plaintiff from spending any funds for pro shop or golf course concessions other

than for or on behalf of defendants, and ordered plaintiff to pay defendants' wages and other benefits from and after Feb. 20, 1974, in the amounts appropriated for 1974.

On appeal plaintiff's chief contentions are (1) that the trial court erred in denying its motion for summary judgment and its motion for directed verdict and for judgment n.o.v.; (2) that the trial court did not have jurisdiction to grant injunctive and mandatory relief in its May 6 order; (3) that plaintiff was deprived of a fair trial because of improper conduct of defense counsel and the court's erroneous rulings on evidence and instructions.

Although the parties have asserted numerous issues in this appeal, we believe the determinative question is whether defendants' employment as greenskeepers was such an integral part of the concession agreements that it could be introduced to show a defense germane to the question of right to possession.

For many years equitable defenses to forcible entry and detainer actions were not permitted. After the fusion of practice and procedure in cases at law and in equity accomplished by the Civil Practice Act, equitable defenses were permitted but an amendment to Section 5 of the Forcible Entry and Detainer Act (Ill. Rev. Stat. c.57, Sec. 5) limited such defenses, as follows:

> "No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise. . . ."

In a 1970 decision, the Supreme Court of Illinois broadened the concept of "germane matters" to permit the validity and enforcibility of installment contracts for the purchase of realty to be raised as a defense in a forcible entry and detainer action. In **Rosewood Corp. v. Fisher,** 46 Ill. 2d 249, 263 N.E.2d 833, 837 (1970), the court quoted with approval from **Bleck v. Cosgrove,** 32 Ill. App. 2d 267, 177 N.E.2d 647, 649 (2d Dist.,

1961), where the purpose of forcible entry and detainer was stated to be "a summary statutory proceeding to adjudicate rights to possession . . . unhampered and unimpeded by questions of title and other collateral matters not directly connected with the question of possession."

In **Rosewood,** it was alleged by defendants, that the payment and forfeiture provisions of the purchase contracts upon which they had defaulted were invalid and unenforcible and in violation of the constitutionally guaranteed civil rights of defendants. The trial court refused to permit these defenses, and on direct appeal, the supreme court reversed.

The problem of giving effect to the statutory requirement that defenses be germane to the question of possession while permitting defenses within the principles announced in the **Rosewood** decision has been troublesome. In its most recent decision, the supreme court noted:

> "Only matters germane to the distinctive purpose of forcible entry and detainer proceedings may be introduced. . . . That purpose is to adjudicate rights of possession, and only matters germane to those rights are properly pleaded or considered. In the recent cases of **Jack Spring, Inc. v. Little,** 50 Ill. 2d 351, 280 N.E.2d 208 (1972), and **Peoria Housing Auth. v. Sanders,** 54 Ill. 2d 478, 298 N.E.2d 173 (1973), landlords sought possession in forcible entry and detainer actions because tenants had failed to pay rent. We there held that the questions whether the defendants in fact owed rent in view of alleged breaches of an express covenant to repair, a breach of implied warranty, and an unconstitutional rental policy, were germane." **Clore v. Fredman,** 59 Ill. 2d 20, 319 N.E.2d 18, 21 (1974).

In **Clore,** the court then held that defendants' answer, which alleged that suit was brought in retaliation for complaints by

the tenant to governmental authorities was germane to the action and stated a defense, particularly since specific statutory ordinance provisions forbidding retaliatory eviction were allegedly violated.

In another recent decision, the court noted that the cases broadening the scope of available defenses have arisen where questions of rent are involved, or where, as in **Rosewood,** the invalidity of the purchase contract upon which the action was based was offered as a defense. **Germania Fed. S. & L. Ass'n v. Jacoby,** 23 Ill. App. 3d 145, 318 N.E.2d 734 (5th Dist., 1974). The court then affirmed the ruling of the trial court that, where rent was not an issue, defendant could not raise objections about the condition of the premises for the first time after the forcible entry and detainer action was commenced.

In **Bleck v. Cosgrove,** *supra,* a question similar to the one before us was raised. In a forcible entry and detainer action, the trial court had entered judgment on the pleadings for possession and rent in favor of the plaintiff, who was the court-appointed receiver of a country club, and against defendant as a tenant of that club. Defendant was a shareholder of the club, and attempted to defend the forcible entry and detainer action on numerous grounds, including the invalidity of the previous foreclosure proceedings to which he was not a party. On appeal, the court ruled that the interests of defendant as shareholder and as tenant embrace separate legal concepts and that in a forcible entry and detainer proceeding he is limited to an assertion of his rights as tenant.

In the case before us, the defenses asserted by defendants go beyond any of the matters previously held to be germane. The pleadings of the defendants consisted of their amended answer and counterclaim. Although the answer denied the fendants, in their testimony at trial, admitted that they signed 1973 expiration date of the concession agreements, the de-

the agreements and that they authorized the change of termination date to Dec. 31, 1973. Thus there was no factual dispute as to the existence and provisions of the written contracts. The only controversy remaining to be resolved from the complaint and amended answer was a question of law: Did the expiration of the contracts on Dec. 31, 1973, terminate defendants' right to possession of the pro shop premises as lessees? Where the terms of a contract have been specifically determined, then the legal effect of such contract presents a pure question of law, and the court alone is permitted to construe it. **St. Louis Stock Yards v. Wiggins Ferry Co.,** 102 Ill. 514 (1882).

We are persuaded that, as a matter of law, the defendants' rights to possession of the pro shops under the concession contracts ended on Dec. 31, 1973. Plaintiff admits that the golf pros had a dual relationship with the Park Board in that they were also employed as greenskeepers, but contends that the employer-employee relationship was not a part of the concession agreements. The concession contracts made no reference to this employment, and defendants have made no claim that the parties at any time expressly agreed that their employment and concessions were mutually dependent. It is admitted that the employment continued until Feb. 20, 1974, when terminated by action of the Park Board. Therefore, we hold that defendants' employment as greenskeepers was not germane to the question of their right to possession of the pro shops, but instead was a separate contractual relationship.

Defendants also filed an amended counterclaim (which was in the form of an answer) alleging that plaintiff was barred from asserting any right to possession by its forcible entry in violation of defendants' rights thereof, and that the unlawful entry was accomplished by termination of defendants' employment as greenskeepers and the erection of tents on the golf courses for use by GSM, the successor concessionnaires. None

of the acts complained of involved a physical entry on the pro shop premises but at most diminished defendants' income which defendants claim amounted to a constructive entry. Having determined that the possessory rights of defendants ended on Dec. 31, 1973, it is obvious that the events complained of in the counterclaim, all of which occurred in 1974, are not germane to this action.

Defendants have contended before this court: "If the totality of defendants' judicially decided rights can be arbitrarily denied under the guise of irrelevant and immaterial remedial labels and false lease claims, then the Forcible Entry and Detainer Act and these judicial proceedings are repugnant to the 1st and 14th Amendments to the federal constitution and sections 2, 5, 12, and 13 of Article I of the Constitution of Illinois." As we understand it, defendants are saying that a ruling against defendants by this court would demonstrate the unconstitutionality of the Forcible Entry and Detainer Act. The statute in question has previously been held to provide procedural due process by allowing certain germane equitable defenses to be considered. **Johnson v. Illinois Dept. of Public Aid,** 467 F.2d 1269 (7th Cir., 1972). Defendants here have had ample opportunity to plead any germane defense that might be available to them, and have offered none. The fact that they were unable to agree to terms for a renewal of their concession contracts with the Park District obviously results in an economic hardship to them, but one that is part of the usual course of business practice, and such hardship is not to be confused with a denial of constitutional rights.

Plaintiff has contended on appeal that the trial court erroneously denied its motion for summary judgment. While this may be so, the rule is well established that, after an evidentiary trial, a previous order denying a motion for summary judgment is not reviewable on appeal, and the result of such denial becomes merged in the subsequent trial. **Mercer v. Sturm,** 10 Ill. App. 3d 65, 293 N.E.2d 457 (3d Dist., 1973).

Since we have found that the matters germane to this controversy do not present disputed issues of fact to be submitted to a jury, we hold that the trial court erred in not directing a verdict for plaintiff and in refusing to dismiss the counterclaim. Plaintiff's right to possession of its premises at the termination of defendants' leases on Dec. 31, 1973, is clearly established as a matter of law, and all matters pleaded and argued by defendants in their counterclaim were not germane to this proceeding. It is not necessary to consider the other errors asserted by plaintiff. We therefore reverse the verdict and judgment thereon and order that judgment be entered here for plaintiff on the complaint and that the counterclaim be dismissed.

In addition to the appeal from the proceedings in the trial court, a number of other related matters are before this court. On June 28, 1974, we ordered a temporary writ of prohibition to issue to stay all proceedings of a substantive nature pending in the Circuit Court of Peoria County until final disposition of this appeal, and the writ of prohibition was made permanent on July 26, 1974. The effect of this writ was to stay enforcement of the injunctive relief ordered by the trial court on May 6 and to vacate a temporary restraining order entered by the trial court on June 26.

On Dec. 18, 1974, plaintiff filed a motion for writ of restitution with this court, requesting that a writ issue to restore plaintiff to possession of the pro shop premises after Dec. 31, 1974. Defendants then filed a motion purportedly for protective orders which seemed merely to request an extension of time for filing of briefs and motions in response to the motion for writ of restitution. Additional time was granted, and defendants thereafter filed a motion to strike plaintiff's motion, together with an answer and jury demand. Plaintiff has also filed objections to defendants' motion for protective orders. All of these matters were taken with the appeal for decision by this court.

In its motion for writ of restitution, plaintiff asserts that the issues raised by this appeal are now moot because defendants

were entitled to possession either until Dec. 31, 1973, or until Dec. 31, 1974, and thus, regardless of the outcome of this appeal, defendants' claim has now expired. It is correct that an appellate court will not review a case merely to decide abstract questions where the issues involved in the trial court no longer exist and where there is no overriding public interest. **Sullivan v. Sheehan,** 20 Ill. App. 2d 380, 156 N.E.2d 374 (1st Dist., 1959). However, at oral argument and in their pleadings in response to plaintiff's motion, defendants have rejected the suggestion that their right to possession has now expired. Thus the issue of possession is clearly not moot.

Persuasive reasons for issuance of a writ of restitution by this court in the event of reversal on appeal were presented by plaintiff at oral argument. Defendants continue in possession of the pro shops under Ill. Rev. Stat. c. 57, Sec. 22, during the pendancy of this appeal. Having reversed the trial court and ordered judgment entered for plaintiff, we believe justice requires that plaintiff be promptly restored to possession. Like the court in **Bleck v. Cosgrove,** *supra*, we feel that "the facts disclosed by this record are insufficient to breathe new life into [defendants'] right to continue possession or to furnish the seed bed for the birth of a new lease. [Their] right to possession having expired, its prompt interment ought not be longer delayed. While this suit has not followed the course of the normal forcible entry and detainer suit, it has reached its proper port. . . ." 177 N.E. 2d at 652.

Article VI, Section 6 of the Illinois Constitution (1970) provides "The Appellate Court may exercise original jurisdiction when necessary to the complete determination of any case on review." In addition, Ill. Rev. Stat. c. 37, Sec. 35, authorizes appellate courts to issue writs ". . . which may be necessary to enforce the due administration of justice in all matters within their jurisdiction." A writ of restitution may be issued by an appellate court to restore possession of disputed premises to those

entitled to them. **Theus v. Young,** 321 Ill. App. 367, 53 N.E. 2d 298 (1st Dist., 1944).

We therefore deny defendants' motion for protective orders, deny defendants' motion to strike plaintiff's motion for writ of restitution, overrule defendants' responsive answer to plaintiff's motion, and strike defendants' demand for an appellate court jury. We direct that the clerk of this court issue a writ of restitution directed to the sheriff of Peoria County for execution in favor of the Peoria Park District, and against the defendants for possession of the golf concession shops situated at plaintiff's five golf courses in Peoria, Illinois.

Judgment for defendant reversed: judgment for possession entered for plaintiff with writ of restitution to issue. Stouder, J. and Scott, J. concur.

STATE OF ILLINOIS,
APPELLATE COURT, } ss.
THIRD DISTRICT,

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keepr of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of March, in the year of our Lord one thousand nine hundred and seventy-five.

(Seal)

/s/ John E. Hall
Clerk of the Appellate Court

APPENDIX H

76-14

State of Illinois
Appellate Court Third District
Ottawa

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord one thousand nine hundred and seventy-seven, within and for the Third District of Illinois:

Present—

Honorable Richard Stengel, Presiding Justice	X
Honorable Allan L. Stouder, Justice	X
Honorable Jay J. Alloy, Justice	
Honorable Tobias Barry, Justice	
Honorable Albert Scott, Justice	X
Joseph Fennessey, Clerk	
James A. Callahan, Sheriff	

Be It Remembered, that afterwards on July 18, 1977 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz.:

Case No. 76-14

In the
Appellate Court of Illinois
Third District

A.D. 1977

Pleasure Driveway and Park District of Peoria, Plaintiff, vs. Edwin Jones, et al., Defendants.	Appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois Honorable Charles W. Iben, Presiding Judge

Publ. in Full

Mr. Justice Stouder delivered the opinion of the court:

Pleasure Driveway and Park District of Peoria brought this action against five golf pros to recover damages occasioned by the defendants' wrongful holdover of the golf concession pro shops at five public fee golf courses owned by the plaintiff. Defendants counterclaimed, alleging wrongful termination of their employment as greenskeepers on each of the five courses. Following a bench trial, the court entered a joint and several judgment against the golf pros in the amount of $127,605 and found for the plaintiff on defendants' couiterclaim. This appeal ensued.

Only a brief summary of the events and facts preceding commencement of this action is necessary to a determination of the issues properly presented here. This litigation relates to a controversy previously before this court in *Pleasure Drive-*

way & Park District v. Kurek, 27 Ill. App. 3d 60, 325 N.E.2d 650, and the opinion in that case should be consulted for a more complete account of the facts.

Previous to 1974, defendants were employed by plaintiff as greenskeepers at plaintiff's five courses and were also concessionaires of the pro shops on those courses for which they paid an annual fee or rent to the Park District. From 1972 until October 1973, negotiations were conducted between the plaintiff and defendants concerning the rental fee for the pro shops and which resulted in a contract between the parties for the year 1973. Subsequent negotiations failed to produce a contract for 1974 and on January 19, 1974 the Park District awarded a three year contract for the pro shops to Golf Shops Management, Inc. (GSM), with the stated intention of continuing defendants' employment as greenskeepers. The contract with GSM was contingent upon plaintiff obtaining control of the pro shops. On January 21, 1975, each of the five golf pros was served with a 30 day written notice to terminate the tenancy of the premises occupied by the pro shops and on February 20, 1974, the Park District filed a forcible entry and detainer action to recover possession of the five pro shops. On the same date the Park Board terminated the employment of the golf pros as greenskeepers.

After a jury trial in the forcible entry and detainer action, the court ordered the plaintiff to restore the golf pros to possession of the pro shops and reinstate them as employees. This judgment was reversed in *Pleasure Driveway & Park District v. Kurek*, 27 Ill. App. 3d 60, 325 N.E.2d 650. In that appeal this court held that the golf pros' right to possession of the pro shops ended on December 31, 1973 and that the golf pros' employment as greenskeepers was not germane to the question of their right to possession of the pro shops, but instead was a separate contractual relationship. A writ of restitution was issued by the court restoring possession to plaintiff, but

was recalled upon order of the Illinois Supreme Court pending a determination of an appeal to that court. Petition for leave to appeal was denied on May 27, 1975 and a second writ of restitution issued on June 30, 1975, restoring possession of the pro shops to the park district.

The present action was filed on July 25, 1975 to recover money damages from the defendants for their wrongful possession of the pro shops from January 1, 1974 until June 30, 1975. The original complaint was amended to include a claim under paragraph 2 of chapter 80 for damages equal to double the yearly value of the land. (Ill. Rev. Stat. 1975, ch. 80, par. 2.) Defendants answered and filed six affirmative defenses which were stricken by the trial court upon plaintiff's motion. Defendants also counterclaimed, seeking restoration of their positions as greenskeepers and back pay from the date their employment was terminated. Plaintiff filed a motion for summary judgment on the issue of liability, relying on our decision in *Kurek* and the trial court granted the motion.

After a bench trial, the trial court refused to award the double damages requested by plaintiff under chapter 80, paragraph 2, but did allow plaintiff damages and used the earlier contract with GSM as a measure of those damages. The court found no merit in defendants counterclaim and entered judgment in favor of plaintiff thereon. Separate appeals were taken from the trial court's judgment by each of the defendants, but were later consolidated into the present appeal. Plaintiff filed a cross-appeal from the trial court's refusal to award double damages.

Following oral arguments and while this case was under advisement to this court, the Circuit Court of Appeals for the Seventh Circuit rendered its opinion in *Kurek v. Pleasure Driveway & Park District* (Docket No. 76-1791, May 26, 1977) (7th Cir. 1977), — F.2d —. The five golf professionals who

are defendants in this action had filed a complaint in federal court seeking money damages for an alleged violation of federal antitrust laws by the defendants (Pleasure Driveway & Park District, the plaintiff in this cause, and other individual named defendants who are not parties to this action) and for violation of the plaintiffs (defendants herein) civil rights under 42 USC 1983. The golf professionals alleged in district court that their right to petition had been violated when their employment as greenskeepers had been terminated. We have allowed the golf professionals motion to add the opinion of the Seventh Circuit Court of Appeals as additional authority and will refer to that decision as needed.

Defendants assert that the trial court committed reversible error when it dismissed the affirmative defense that *Pleasure Driveway & Park District v. Kurek*, 27 Ill. App. 32, 60, 325 N.E.2d 650, was procured by fraud and when it entered summary judgment against defendants on the issue of liability because of that decision. Of the affirmative defenses specified in defendants' answer, error is assigned on appeal only as to the affirmative defense of fraud. However, in their motion to add as additional authority the opinion of the Seventh Circuit Court of Appeals previously referred to, defendants argue that since the Seventh Circuit Court of Appeals has decided that the plaintiff may be subject to damages for antitrust violations, we should reverse the trial court's dismissal of defendants' affirmative antitrust defenses. We decline to do so. Having failed to initially allege and argue the dismissal of the antitrust defense, defendants have waived whatever assignment of error they might have had to that dismissal. We therefore do not consider whether the affirmative antitrust defense alleged was meritorious.

The specific fraudulent acts alleged in the affirmative defense is that plaintiff fraudulently failed to provide a complete record on appeal in *Kurek*, and but for the omissions occurring in the record, this court would have affirmed the lower court's

decision in defendants' favor. Defendants' arguments are without merit.

Supreme Court Rules 322 and 329 (Ill. Rev. Stat. 1975, ch. 110A, pars. 322 and 329) provide ample means to insure a true record is before the Appellate Court and it was defendants' responsibility to cure whatever inaccuracies, if any, that might have existed in the record. Having failed to do so, defendants cannot now claim that this court's decision in *Kurek* was procured by fraud because of alleged deficiencies in the record.

The next issue relates to the complaint. Defendants contend that the judgment of the trial court was wrong as a matter of law and present three reasons in support of their position. We will consider each of these arguments separately.

First, defendants argue that because the amended complaint "cites section 2, chapter 80 of the Illinois Revised Statutes in support of its claim for damages," the complaint seeks relief only under that statute. Defendants contend that the trial court found that defendants did not wilfully holdover (as required by section 2) and since the complaint is based solely on that statute, plaintiff was not entitled to judgment.

Upon examination of the amended complaint, it becomes evident that the defendants' view of the complaint is too narrow. We find nothing which indicates that plaintiff was requesting relief solely under section 2 to the exclusion of all other relief. To the contrary, the complaint clearly alleges that by reason of the defendants' wrongful holdover, the plaintiff has been deprived of the fair rental value of the concession shops and sustained damages because of its inability to honor contractual commitments. Hence, the claim for double rent under section 2 is merely cumulative to the plaintiff's basic claim for fair rental value and consequential damages.

Next, defendants claim that plaintiff has failed to sustain its burden of proof as to damages because the trial court was unable

to ascertain the exact amount of fair rental value. By so asserting, defendants suggest that the only measure of damages for wrongful holdover is fair rental value. We do not find such to be the law in Illinois. While it is generally true that fair rental value is often used as a correct measure of damages for wrongful holdover, it is by no means the only measure of damages (*Rhodes v. Sigler*, 44 Ill. App. 3d 375, 357 N.E.2d 846, *Leave to Appeal Denied; Ash v. Barret*, 1 Ill. App. 3d 414, 274 N.E. 2d 149. See generally 32 ALR 2d 582), except when relief is awarded under section 2 of chapter 80. (Ill. Rev. Stat. 1975, ch. 80, par. 2.) Lost Profits (*Rhodes v. Sigler*, 44 Ill. App. 3d 375, 357 N.E.2d 846, *Leave to Appeal Denied*) and out of pocket expenses (*Ash v. Barret*, 1 Ill. App. 3d 414, 274 N.E. 2d 149) are properly cognizable in an action for wrongful holdover. We believe the trial court properly used as a measure of damages a single sum composed of rental value and the value of an exclusive license. The trial court properly added to this sum the plaintiff's costs of paying personnel to perform duties which GSM would have performed under the contract, costs which were reasonably foreseeable and would not have been incurred but for defendants' wrongful holdover. We find the trial court's determination of damages within the law and supported by the evidence.

Defendants remaining objection relates to the joint and several nature of the judgment. The five defendants are jointly and severally responsible for the $127,605 judgment. They contend that since each golf pro was a tenant of a particular concession shop under an individual lease agreement between the respective pro and Park District, their liability, if any, can only be several. Hence, any joint and several judgment is erroneous as a matter of law and must be reversed. We disagree.

During the period of negotiations from 1973 until the present appeal, defendants have consistently acted in concert.

Through one common agent, the golf pros sought to improve the compensation they received as concessionaires of the pro shops and from their employment as greenskeepers. While this alone would not necessarily establish the joint and several character of defendants' actions, further conduct by the defendants justifies the joint and several nature of the judgment. Throughout the entire course of litigation which has spanned over three years and encompassed over fifteen different judicial proceedings in both state and federal courts, defendants have prosecuted and defended these actions jointly and severally. Only after entry of the judgment in this case did defendants file any pleadings or make any indication that they wished to be treated separately and not as a group. Having chosen to ally themselves into a single group and to prosecute and defend numerous legal actions arising out of the same fundamental dispute without once acting independently in that dispute, defendants cannot divorce themselves from their earlier conduct and elect to be treated severally. The trial court was correct in ordering a joint and several judgment.

As concerns the counterclaim, the golf pros contend that the trial court's finding that they were discharged because they refused to voluntarily vacate the pro shops establishes that defendants were penalized for exercising rights secured to them under the petition and due process clauses of the 1st and 14th amendments to the United States Constitution. Defendants claim that either their right to continue employment is protected by due process or in the alternative, that their dismissal abridged their right to petition.

In support of the contention that defendants' dismissal abridged their right to petition, defendants direct us to the Seventh Circuit Court of Appeals decision previously mentioned. (*Kurek v. Pleasure Driveway & Park District* (Docket No. 76-1791, May 26, 1977), (7th Cir. 1977) — Fed.2d —.) The

Seventh Circuit Court of Appeals held, *inter alia*, that the substance of Count 2 of defendants' federal complaint had not been previously disposed of by the judgment of the circuit court of Peoria County, contrary to what had been decided by the district court. The judgment of the circuit court of Peoria County referred to above is the same judgment which forms the basis of this appeal. Upon the motion of defendants, we have allowed the opinion of the Seventh Circuit Court of Appeals to be cited as additional authority. We have examined that opinion to determine whether the substance of the issues presented by defendants' claimed denial of the right to petition was reached by the Seventh Circuit in their opinion. Upon an examination of that opinion, we find the only issue reached was whether Judge Iben of the circuit court of Peoria County had decided adversely to the golf pros the critical facts pertinent to the golf pros claim under 42 USC 1983. The Seventh Circuit found that Judge Iben had not disposed of the golf pros' claim or of critical facts pertinent to it and reversed and remanded the cause for further proceedings. The Seventh Circuit Court of Appeals therefore did not decide the issues raised by defendant golf pros on this appeal. From a review of defendants brief in this cause, of which the Circuit Court of Appeals was unaware, all the reasons why defendants discharge should be considered wrongful were or could have been urged and resolved in the case before the circuit court of Peoria County.

While defendants claim a protectable property interest in their employment, they fail to support their conclusion by either argument or reference to facts which might indicate the existence of such an interest. In *Board of Regeants of State College v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701, after discussing cases dealing with 14th Amendment property interest, the Court stated:

> "Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To

> have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577, 33 L.Ed.2d at 561, 92 S.Ct. at ....

The Court held that a non-tenured professor teaching at a state university did not have an interest in continued employment which was encompassed within the 14th Amendment's protection of liberty and property. We find nothing in the record or in defendants brief to demonstrate why a different result should be reached here. Furthermore, while various procedures give all Park District employees the right to present grievances to the Park District, the defendants failed to avail themselves of such an opportunity.

Nor can we agree with the defendants that their dismissal as greenskeepers violated their constitutional right to petition. The Forcible Entry and Detainer Act (Ill. Rev. Stat. 1975, ch. 57, par. 1 *et seq.*) gave defendants a right to remain on the leased premises while presenting their defenses to the Forcible Entry and Detainer action which had been commenced by plaintiff, a right which the defendants utilized to stay in possession for over 18 months past the expiration of their lease. But the election to pursue a certain course of conduct guaranteed by statute or federal and state constitutions is not always without adverse consequences. Not only does the constitution guarantee to everyone the right to petition, it also grants employers and employees alike certain rights in deciding whether or not to associate with one another in an employment relationship. As was aptly stated in *Mitchell v. Stanolind Pipe Line Co.* (10th Cir. 1950), 184 F.2d 837:

> "It is not the function of the courts in the absence of a contract to compel a person to accept or retain another in his employ, nor is it the function of courts to compel any person against his will to remain in the employ of another." 184 F.2d at 838.

In the absence of contract or statutory provision, an employer may discharge an employee without cause or reason or for any cause or reason. (*Odell v. Humble Oil & Refining Co.* (10th Cir. 1953), 201 F.2d 123; *Mitchell v. Stanolind Pipe Line Co.* (10th Cir. 1950), 184 F.2d 837.) In *Mitchell* an employee was warned by his employer that if he brought a tort action for assault and battery against a fellow employee to recover damages, his employment would be terminated. The employee commenced the action against his fellow employee and was immediately discharged. The court rejected the employee's claim for damages based upon an alleged violation of the employee's right to petition. We hold that defendants' right to petition was not abridged when their employment was terminated. To hold otherwise would force plaintiff and the defendants to associate with one another in a non-consensual relationship. Absent contract or statutory provision, plaintiff was free to discharge defendants. The trial court's judgment in favor of plaintiff on the defendants' counterclaim was well supported by both the law and the evidence.

What remains is plaintiff's cross-appeal which claims that double damages under paragraph 2 of chapter 80 should have been awarded. (Ill. Rev. Stat. 1975, ch. 80, par. 2.) We note initially that a notice of cross-appeal had been filed by plaintiff as to only one defendant, Richard Hoadley. We therefore dismiss plaintiff's cross appeal as to the following defendants; William Kurek, Walter Turdele, Robert Togikawa, and Edwin Jones. We will determine the merits of plaintiff's cross-appeal as to defendant Hoadley.

Before double damages may be awarded under Ill. Rev. Stat. 1975, ch. 80, par. 2, the plaintiff must prove that the defendants' holding over was wilful. Paragraph 2 is essentially punitive in nature (*Stuart v. Hamilton*, 66 Ill. 253) and should be applied cautiously. We believe that such a punitive award is not applicable to situations where a bona fide dispute exists between the parties as to who had the right of possession. Here, there

can be little doubt as to the bona fides of the controversy between the golf professionals and the park district in light of the original adjudication by the circuit court of Peoria County that the golf pros were entitled to possession. While that judgment was reversed by this court in *Pleasure Driveway & Park District v. Kurek*, 27 Ill. App. 3d 60, 325 N.E.2d 650 thereby making the golf pros responsible for damages caused by their holdover, that initial determination did conclusively establish the bona fides of the defendants' position and render section 2 inapplicable. The trial court's order denying double damages is supported by the evidence.

For the foregoing reasons the judgment of the circuit court of Peoria County is affirmed.

Judgment affirmed.

STENGEL, P. J. and SCOTT, J., concur.

State of Illinois,
Appellate Court, } ss.
Third District,

..... as Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 18th day of July, in the year of our Lord one thousand nine hundred and seventy-seven.

JOSEPH FENNESEY
Clerk of the Appellate Court

APPENDIX I

No. 76-14

In the Appellate Court of Illinois, Third District

Pleasure Driveway and Park District of Peoria,
Plaintiff-Appellee,
vs.
Edwin Jones, et al.,
Defendants-Appellants.
Appeal from the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County.
Honorable Charles W. Iben, Presiding Judge.

MOTION FOR LEAVE TO FILE ADDITIONAL AUTHORITY AND FOR OTHER INCIDENTAL RELIEF

Now co e defendants-appellants and state and suggest to and move the Court as follows:

1. This case was argued on January 12, 1977 and insofar as is presently known it is still under advisement.

2. On May 26, 1977, the United States Court of Appeals for the Seventh Circuit handed down its opinion in *Kurek, et al. v. Pleasure Driveway & Park District of Peoria, et al.* [7th Cir. No. 76-1791 (5/26/77)] and a true and complete copy is appended hereto as Exhibit A.

3. The subject matter and decisions reflected by Exhibit A hereto are directly connected with and relevant to the subject matter and issues pending on review in this appeal and should be considered by this Court as part of its decisional processes, *viz:*

(a) The trial court in this case rejected defendants' affirmative antitrust defenses and Exhibit A hereto holds that the PARK DISTRICT is indeed subject to liabilities under the antitrust laws.

(b) The trial court in this case measured defendants' liabilities under the complaint on the basis of what is referred to in Exhibit A hereto, *inter alia*, as follows: "that GSM made an economically unrealistic 'sham' proposal, not actually to be put into effect, in concert with at least some Park District officials, knowing that the proposal would not be acted upon as indicated in the bid invitation but would, instead, be used by the Park District to coerce plaintiffs (defendants here) into conduct violative of the antitrust laws." [Exhibit A, p. 18].[1]

(c) Should this Court affirm the judgment against these defendants on the complaint then, in light of Exhibit A hereto, the PARK DISTRICT, as such, as well as its individual officers, attorney and administrative staff would be subject to liabilities under section 4 of the Clayton Act [15 U.S.C. § 15] for treble that amount, or for $382,815 and any such result would be incongruous and would be likely to hold the law and judicial processes up to public disrepute.

4. Furthermore, the opinion of the 7th Circuit with regard to the employment terminations [Exhibit A, pp. 20-23] should be considered by this Court with regard to the judgment on re-

---

[1] When this case was tried in the court below, GSM had no operational track record. This fact in tandem with its substantial subsidies in Park District funds, property and credit during the pendency of the appeal now reflected by *Pleasure Driveway & Park District v. Kurek*, 27 Ill.App.3d 60 (3rd Dist. 1975) made it impossible to do more than speculate as to whether "GSM made an economically unrealistic 'sham' proposal". Subsequent transactions and events can now establish "an economically unrealistic 'sham' proposal" by hard evidence.

view on the counterclaim involving the same subject matter, *viz:*

(a) The PARK DISTRICT is not a person under 42 U.S.C. § 1983 and "was properly dismissed out as a defendant" in the federal proceeding. [Exhibit A, p. 21].

(b) But the opinion of the 7th Circuit seems to hold that the finding of Judge Iben here on appeal together with relevant legal principles under the Illinois Forcible Entry & Detainer Act [Exhibit A, pp. 21-22], establishes that defendants' employment terminations violated their rights under the Petition and Due Process Clauses of the 14th Amendment to the Constitution of the United States *a fortiori* subject the PARK DISTRICT officers, attorney and administrative staff to individual liabilities under 42 U.S.C. § 1983.

(c) The fact that the PARK DISTRICT as such is not subject to federal jurisdiction in the circumstances of this case [See: *Aldinger v. Howard*, 427 U.S. 1] does not exempt it from *respondeat superior* liability for the constitutional torts of its officers, attorney and administrative agents under Illinois law, even where the misconduct of the tort-feasing agents is knowing, malicious and intentional. [See e.g.: *City of Rock Falls v. Chicago Title & Trust*, 13 Ill.App.3d 359,363-364 (3rd Dist. 1973); *Young v. Hansen*, 118 Ill.App.2d 1,9 (2nd Dist. 1969)].

(d) Thus, it would be constitutionally, legally and intrinsically contradictory for the PARK DISTRICT officers, attorney and administrative agents to be held liable for these defendants' employment terminations on the basis of Judge Iben's findings in the federal proceedings and for the PARK DISTRICT to escape *respondeat superior* lia-

bility on precisely the same finding under the counterclaim here.

5. Under Rule 40 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1254(1) the judgments and opinion of the 7th Circuit [Exhibit A] are subject to rehearing and certiorari procedures and ordinarily we would await the exhaustion of those processes, but in light of the length of time this appeal has been under advisement together with the manifestly direct involvement the 7th Circuit's decisions have with this case, we perceive it as our duty to bring Exhibit A hereto, to this Court's attention without delay.

6. There is one other reason why the opinion of the 7th Circuit is material to the proceedings pending here. Over our objection, plaintiff-appellee was permitted to file a "Supplemental Record On Appeal" which included the June 1, 1976 "Decision & Order" of United States District Judge Robert D. Morgan in *Kurek, et al. v. Pleasure Driveway & Park District of Peoria, et al.* [S.D.Ill.N.D., No. P.Civ. 76-9]. With the exception of the 2 points under the Civil Rights Counts which we suggested for affirmance (Exhibit A, p. 21), the attached opinion and judgments of the 7th Circuit [Exhibit A] reverse the foregoing "Decision & Order" in all respects.

Wherefore, defendants-appellants move for an order or orders granting one, or more, of the following:

(1) That they be authorized to file Exhibit A hereto as additional authority concerning the merits of their contentions in this appeal.

(2) That they be permitted to supplementally brief and reargue the appeal in light of Exhibit A hereto and of its impact and effect on the merits.

(3) That such other and further orders as this Court may deem just and appropriate in light of Exhibit A hereto, be entered.

Respectfully submitted,

JOHN E. CASSIDY, JR.
800 Lehmann Building
Peoria, Illinois 61602
Telephone: 309/676-0591
Attorney for Appellants

Subscribed and sworn to before me this 31st day of May, 1977.

F. B. KOWALSKE
Notary Public
Peoria County, Illinois

APPENDIX J

In the Circuit Court of the Tenth Judicial Circuit of Illinois
Peoria County

Pleasure Driveway and Park District of Peoria,
Plaintiff,
v.
William Kurek, et al.,
Defendant.
Case No. 75 L 2893

ORDER

Clerk's Copy—White
Plaintiff's Copy—Yellow
Defendant's Copy—Pink

In accordance with the Memorandum of Decision filed herein, Judgment is hereby entered in favor of the Pleasure Driveway and Park District and against William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones and Richard Hoadley, and each of them in the amount of $127,605.00 and costs of this action on the complaint. It is further Ordered that Judgment is entered in favor of the Pleasure Driveway and Park District and against William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones and Richard Hoadley, and each of them on the counterclaim.

November 14, 1975

/s/ CHAS. IBEN
Judge of the Tenth Judicial Circuit

(Filed Nov. 14, 1975)
Approved as to form
Julian E. Cannell

Memorandum of Decision

The decision in this case must rest on the opinion of the Appellate Court in case 74-127, affirmed by the Illinois Supreme Court. It follows also case No. 75 L 2893 in this Court, granting summary judgment on the question of liability for damages to the Plaintiff. The questions here to be decided are: one, the amount of damages sustained by the Plaintiff Park District; and, two, the Counterclaim of Defendants for damages.

The Appellate Court found the Plaintiff entitled to possession after December 31, 1973 of the pro shop premises on Plaintiff's golf courses. This Court finds that the Plaintiff gave notice of its intention to take possession at that time. But because of continuing negotiations between the parties, the Plaintiff permitted the Defendants to hold possession during the month of January. This Court finds a month-to-month tenancy thereby created. When negotiations were broken off in January Plaintiff made further demand for possession. Allowing for the requisite 30-day notice, this entitled the Plaintiffs to possession March 1. A measure of the fair value of the premises and/or licenses for concession rights were shown by the evidence to be the payment of $2,916.67 per month by a third party, arrived at by an arms-length, open bid. In addition thereto, the Plaintiff suffered the loss of $80,647.31 to be paid to so-called inside starters at the golf courses in lieu of rent or further remuneration by the third party. This cost was previously borne by the Park District. The Court finds the loss to Plaintiff based on the rental and/or license value as fixed by what others were willing to pay at $127,605.80.

How much, then, of this amount represents rent within the statute and how much the value of concession rights? Clearly some value received was in a license. The concessionaires, if

not by explicit contract terms, had exclusive rights to operate commercially on the golf courses. This included the rental of golf carts not necessarily dependent upon their being housed on golf course property, the right to give lessons, etc. There was no evidence to enable the Court to determine what portion of the value was rent. In the absence of such proof the question must be presumed against the party who failed to adduce it.

There is a further impediment to the claim for doubling the damages. There is no question that the case law in Illinois, as defined in one case of Alexander v. Loeb, 230 Ill. 454, provides for the doubling of rental value in this situation. Research indicates, however, that this holding of this old Illinois law is out of line with holdings in several other states with similar statutes. See Corpus Juris. There the interpretation of the word "willful" has precluded the doubling of damages where the person holding over does so in good faith, with a reasonable legal dispute over possession. It is hard to think of any more reasonable dispute than where, in the present case, a judgment of the Circuit Court in fact was entered in the Defendants' favor at an early stage. This Court is inclined to hold that Illinois would not persist in calling such a holding over "willful".

The question remaining is the Defendants' Counterclaim. Citing dicta in Powell v. Jones, they claim some due process to the Defendants in their discharge from positions of Golf Course Managers/Pro Greenkeepers. The terms of the policies, rules and regulations of the Park District, Defendants' Exhibit 15A, would seem, further, to form some contractual basis of Defendants' employment.

Defendants were notified of their discharge from their Golf Course Managers/Pro Greenskeepers possession on February 20, 1974. The language of the notification reflected the general written policy of the Board for disciplinary discharges. A spelling out of these reasons came in a Park District press release,

Defendants' Exhibit 17. This Court had no evidence Defendants, in fact, received the press release, or that it came to their notice. "However, the reason for their termination clearly appears to have been the Defendant's insistence on remaining in the golf shop premises. There is abundant evidence that they stubbornly and intractably insisted through litigation, and other ways, on this claim, spurning other avenues. They can have had no doubt about the reason for their discharge, i.e. their refusal to give up the premises. They did not, moreover, avail themselves of their right to present any grievances to the District under procedures provided. Their only course was to persist in the courts. This Court must hold they must abide the risks of that, and the outcome. This Court finds, therefore, for the Plaintiff on the Defendants' Counterclaim." Should, however, better authority decide differently, the Court finds the Golf Course Managers/Pro Greenskeepers salaries to have been, on an annual basis: Kurek, $11,130; Durdle, $9,782; Jones, $9,782; Togikawa, $9,781; Hoadley, $8,648; all for the period of January 1, 1974, through July 3, 1975.

In adition to the damages of $127,605 found for Plaintiff must be added the previously agreed payment due from Defendants for the period of January 1 through March 1, 1974, if any.

Allocating the damages of the Plaintiff for the period after April 25, 1975, the Court finds that portion of the damages to be $34,796.

APPENDIX K

In the Circuit Court of the Tenth Judicial
Circuit of Illinois
Peoria County

William Kurek, et al.,
Plaintiffs,
vs.
Golf Shop Management, Inc., an Illinois Corporation,
Defendant,
Pleasure Driveway and Park District of Peoria, Peoria, Illinois, an Illinois political subdivision,
Third Party Plaintiff,
vs.
William Kurek, et al.,
Third Party Defendants.

Case No. 75 M 3128

Case No. 75 E 3231
Consolidated

INJUNCTION ORDER AND JUDGMENTS

(Filed Sept. 3, 1975)

Now on this 21st day of August, 1975, comes the Plaintiffs and Third Party Defendants, William Kurek, Walter Durdle, Edwin Jones, Robert Togikawa and Richard Hoadley, by their attorney, John E. Cassidy, Jr., of Cassidy, Cassidy, & Mueller and Third Party Defendant, John E. Cassidy, Jr., pro se and comes also the Defendant, Golf Shop Management, Inc., an Illinois corporation, by its attorney, J. Michael Mathis, and comes also the Third Party Plaintiff, Pleasure Driveway and

Park District of Peoria, Peoria, Illinois, an Illinois political subdivision, by its attorney, Joseph Z. Sudow, of Kavanagh, Scully, Sudow, White & Frederick.

And it appearing to the Court that the Plaintiffs, William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones and Richard Hoadley, hereinafter called "Golf Pros", heretofore commenced this action No. 75 M 3128 by filing their Complaint in Forcible Entry against the Defendant, Golf Shop Management, Inc., an Illinois Corporation.

And it further appearing to the Court that the Third Party Plaintiff, Pleasure Driveway and Park District of Peoria, Peoria, Illinois, an Illinois political subdivision, hereinafter called "Park Board", commenced an action in case number 75 E 3231 by filing its verified Complaint for Injunction against the Third Party Defendants, William Kurek, Walter Durdle, Edwin Jones, Robert Togikawa, Richard Hoadley and John E. Cassidy, Jr., and on Motion of the said Third Party Defendants said action was consolidated with this cause and a stipulation entered that the Complaint in consolidated Case No. 75 E 3231 would stand as a Third Party Complaint and the Third Party Defendants' Appearance, Answer and Affirmative Defense to that Complaint would stand as its appearance, Answer and Affirmative Defense to the Third Party Complaint as consolidated herein and that all parties had completed the offering of any evidence and law, and submitted the issues raised in said pleadings to the Court.

And the Court having examined the files and records in these causes and in this consolidated cause and having heard evidence and taken judicial notice of the portions of the common law record in Case No. 74 M 602 as pointed out by the Golf Pros, the opinion of the Appellate Court in its Case No. 74-127, the decisions of the Supreme Court in its Case No. 47469, and the various pleadings and motions filed in the Appellate and Supreme Courts, including those orders of the latter Court denying

the Golf Pros' two petitions for leave to file original actions and two petitions for leave to appeal, and the arguments of counsel for all parties;

And now being fully advised in the premises finds that each of the Defendants in this cause and each of the Third Party Defendants have been duly and properly brought before the Court either through service of summons or entry of appearance or personal appearance, all in the manner provided by the law; that due and proper notice has been given to each of the Plaintiffs, the Defendant, the Third Party Plaintiff and each of the Third Party Defendants during the progress of this cause as required by law with the parties at all times being present in open Court either in person or by their respective attorneys; and this Court has acquired and now has jurisdiction of all the parties to this cause and the subject matter hereof in both Case No. 75 M 3128 and Case No. 75 E 3231.

And it now appearing to the Court that the Plaintiffs, Golf Pros, have duly filed their Motion for Summary Judgment for the Plaintiffs and against the Defendant, GOLF SHOP MANAGEMENT, INC.;

And it further appearing to the Court that the Defendant, GOLF SHOP MANAGEMENT, INC., has duly filed its Motion for Dismissal of the Plaintiffs' Complaint with prejudice and its motion for a reasonable attorneys' fees and expenses for the Defendant and against the Golf Pros, pursuant to Statute (Chapter 110, Illinois Revised Statute, Section 41);

And it further appearing to the Court that the Third Party Plaintiff, Park Board, has duly filed its Motion for a Temporary Injunction based on the verified Complaint herein against the Third Party Defendants and its motion for a reasonable attorneys' fees and expenses pursuant to Statute (Chapter 110, Illinois Revised Statute, Section 41);

And this cause coming on now to be heard upon the said Golf Pros' Complaint and Motion for Summary Judgment; the Motion to Dismiss with prejudice by the Golf Shop Management, the Third Party verified Complaint for Injunction of the Park Board, and the Answer and Affirmative Defense of the Golf Pros, and John E. Cassidy, Jr., as Third Party Defendants, the Motion for a Temporary Injunction by the Park Board, the Section 41 Motion for reasonable attorneys' fees and expenses by the Golf Shop Management, Inc., the Section 41 Motion for reasonable attorneys' fees and expenses by the Park Board, and upon all other pleadings, exhibits, items of judicial notice and all other matters of record herein;

And it further appearing to the Court that due notice of the presentation of this Decree has been given to all parties entitled thereto and the Court having heard the arguments of counsel and having taken further evidence as to the amount of the attorneys' fees and expenses sustained by the Golf Shop Management and by the Park Board, and being fully advised in the premises, makes the following findings of fact:

1. That the allegations made by the Golf pros in their Complaint, Motion for Summary Judgment, Answer and Affirmative Defense have been previously litigated and considered on numerous times, and have been and are finally adjudicated by the Third District Appellate Court of Illinois in its opinion in Case Number 74-127 and by the Supreme Court of Illinois in its denial of two separate petitions for leave to file original actions, and two separate petitions for leave to appeal in its Case Number 47469.

2. That the issues raised by the Golf Pros in the aforesaid pleadings have been determined by the aforesaid reviewing courts by means of said final judgment and orders.

3. That the Golf Pros allegations in Paragraph 3 of their complaint and paragraph 1 of their Motion for Summary Judgment are made without reasonable cause and not in

good faith and are found to be untrue in that they misrepresent and directly contradict the said final judgment of the Third District Appellate Court in its Case Number 74-127 and the orders of the Supreme Court of Illinois in its Case Number 47469.

4. That the Golf Pros' allegations in paragraph 4 of their Complaint and paragraph 2 of their Motion for Summary Judgment are made without reasonable cause and not in good faith, and are found to be untrue in that they misrepresent the issues previously litigated and finally adjudicated by the aforesaid courts.

5. That the Golf Pros have without reasonable cause and not in good faith, made allegations, found to be untrue, that certain matters were not previously litigated when, in fact, the aforesaid Courts had considered the matters and adjudicated them, which adjudications had become final.

6. That the allegations made by the Golf Pros as Third Party Defendants in paragraphs 3, 4, and 5 of their Answer and Affirmative Defense were made without reasonable cause and not in good faith, and found to be untrue in that they purport to represent finally adjudicated facts which are in direct contradiction to the said final judgments of the Third District Appellate Court of Illinois in its Case Number 74-127 and the Supreme Court of Illinois in its Case Number 47469.

7. That the Golf Pros have used such allegations and misrepresentations to harass the Park Board by vexatious and harassing litigation on issues previously and finally adjudicated.

8. That the Golf Pros have engaged in vexatious and harassing litigation against the Park Board on the issue of possession and operation of the property referred to in the verified Complaint as the Golf Course Concession Shops.

9. That the Park Board and the public has been and will continue to be irreparably injured, suffering serious financial injury and inconvenience, by such vexatious or harassing and continued litigation.

10. That the Park Board has no adequate remedy at law to prevent such vexatious and harassing litigation or the injury and inconvenience resulting therefrom.

11. That the Defendant, Golf Shop Management, Inc., has actually incurred expenses and attorneys' fees in the amount of FIVE HUNDRED DOLLARS ($500.00) by reason of being harassed and forced to defend a law suit based upon the said untrue pleadings of the Golf Pros as Plaintiffs and the Court having heard evidence thereon finds that amount reasonable.

12. That the Park Board has actually incurred expenses and attorneys fees in the amount of SIXTEEN HUNDRED THIRTY-EIGHT DOLLARS ($1,638.00) by reason of being harassed and becoming a party to continued and vexatious proceedings based upon the untrue pleadings of the Golf Pros as Plaintiffs and as Third Party Defendants, and the Court having heard evidence thereon, finds that amount reasonable.

13. That in all respects JOHN E. CASSIDY, JR., named as a Third Party Defendant has been acting solely as attorney for the Golf Pros and by virtue thereof should not be considered as a party in these proceedings.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Golf Pros' (Plaintiffs') Motion for Summary Judgment be and the same is hereby denied.

IT IS FURTHER ORDERED that the Golf Shop Management, Inc.'s Motion to Dismiss Plaintiffs' Complaint with prejudice be and the same is hereby sustained and said Complaint is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that Golf Shop Management, Inc.'s Motion for reasonable attorneys' fees pursuant to Rule 41 be and the same is hereby sustained and that the Golf Pros thereby be summarily taxed for reasonable attorneys' fees in the sum of FIVE HUNDRED DOLLARS ($500.00) and judgment is hereby entered accordingly in favor of Golf Shop Management, Inc. against WILLIAM KUREK, WALTER DURDLE, EDWIN JONES, ROBERT TOGIKAWA and RICHARD HOADLEY: and SXECUTION MAY ISSUE.

IT IS FURTHER ORDERED that JOHN E. CASSIDY, JR. be stricken as a Third Party Defendant.

IT IS FURTHER ORDERED that the Park Board's Motion for a Temporary Injunction, restraining and enjoining the Third Party Defendants, WILLIAM KUREK, WALTER DURBLE, EDWIN JONES, ROBERT TOGIKAWA and RICHARD HOADLEY, and each of them, together with their agents, servants and attorneys and all persons acting in concert or participating with them or with any one of them who receive actual notice of this Order by personal service or otherwise, from prosecuting any litigations involving the ownership or possession (except claims for damages, if any) of or interfering with the operation of the property referred to in the verified Complaint as the Golf Course Concession Shops and the ancillary buildings located at:

Northmoor Golf Course, 5805 N. Knoxville Ave., Peoria, Ill.
Kellogg Golf Course, 1212 Kickapoo Terrace, Peoria, Ill.
Newman Golf Course, 2021 W. Nebraska, Peoria, Ill.
Detweiller Golf Course, 8412 N. Galena Road, Peoria, Ill.
Madison Golf Course, 2735 W. Seventh Street, Peoria, Ill.

IT IS FURTHER ORDERED that such Injunction issue without bond pursuant to statutory exemption (Chapter 69, Illinois Revised Statute, Section 9).

IT IS FURTHER ORDERED that the Park Board's Motion for expenses and reasonable attorneys' fees be and the same is hereby sustained and that the Third Party Defendants' thereby be summarily taxed for reasonable attorneys' fees and expenses in the amount of SIXTEEN HUNDRED THIRTY-EIGHT DOLLARS ($1,638.00) and judgment is hereby entered accordingly in favor of PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, Peoria, Illinois, against WILLIAM KUREK, WALTER DURBLE, EDWIN JONES, ROBERT TOGIKAWA and RICHARD HOADLEY; and EXECUTION MAY ISSUE.

IT IS FURTHER ORDERED on the basis of the Golf Pros' waiver of all notice requirements and on the Motion of Park Board that said Temporary Injunction be made permanent and that a permanent Writ of Injunction be issued by the Clerk of this Court restraining and enjoining the Third Party Defendants, WILLIAM KUREK, WALTER DURDLE, EDWIN JONES, ROBERT TOGIKAWA and RICHARD HOADLEY, and each of them together with their agents, servants, and attorneys, and all persons acting in concert or participating with them or with any one of them who receive actual notice of this Order by personal service or otherwise from prosecuting any litigation involving the ownership or possession of or interfering with the operation of the property referred to in the verified Complaint as the Golf Course Concession Shops and the ancillary buildings located at:

Northmoor Golf Course, 5805 N. Knoxville Ave., Peoria, Ill.
Kellogg Golf Course, 1212 Kickapoo Terrace, Peoria, Ill.
Newman Golf Course, 2021 W. Nebraska, Peoria, Ill.
Detweiller Golf Course, 8412 N. Galena Road, Peoria, Ill.
Madison Golf Course, 2735 W. Seventh Street, Peoria, Ill.

Entered: Sept. 3/75

CHAS. IBEN
The Honorable Charles Iben

APPENDIX L

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

August 25, 1977

Before
Hon. Wilbur F. Pell, Circuit Judge

William Kurek, et al., Plaintiffs-Appellants, No. 76-1791 vs. Pleasure Driveway and Park District of Peoria, Illinois, etc., et al., Defendants-Appellees.	Appeal from the United States District Court for the Southern District of Illinois, Peoria Division. No. P-Civ-76-9 Judge Morgan

This matter comes before the court on the "RESPONSE TO MOTIONS TO STAY MANDATE" filed herein on August 24, 1977 by counsel for the plaintiffs-appellants. Treating said response as a motion to reconsider this court's order of August 27, 1977,

IT IS ORDERED that said motion be and the same is hereby DENIED. Plaintiffs-appellants' request for alternative relief is premature since it does not appear that the enforcement and collection of the state court judgment is imminent. The parties are directed however, to notify the court of any collection efforts made while the mandate resides in the Seventh Circuit. Accordingly, the request for alternative relief is DENIED at this time.

APPENDIX M

In the United States District Court
Southern District of Illinois
Southern Division

William Kurek, Walter Durdle, Robert Togikawi, Edwin Jones, and Richard Hoadley, Plaintiffs, v. Pleasure Driveway and Park District of Peoria, Illinois, et al., Defendants.	No. P-CIV-76-9.

Decision and Order on Motion for Leave to File Amendment to Complaint and Motion to Open, Alter or Amend

(Filed June 30, 1976)

Plaintiffs' third complaint in this court, involving essentially the same subject matter, was finally dismissed on defendants' motion on June 1, 1976, through a written decision which it is unnecessary to repeat. The present motions seek supplementation of that complaint, with a proposed Count III, and revision of that decision of this court.

The court simply cannot justify detailed response to the assertions in some thirty-five pages of text of said motions and proposed amendment, plus some thirty-three pages of an attached Group Exhibit A, plus two state court opinions unfavorable to plaintiffs, as well as prior motions and affidavits filed herein, which are incorporated by reference. It must suffice to say that this court has considered all of same in relation to the instant

motions, and finds said instant motions to be without any significant merit.

Plaintiffs seek to ignore or relitigate parts of a factual picture which has been heretofore judicially determined with finality, and thereby to raise federal antitrust and constitutional violations which simply do not exist. The material facts, as heretofore shown beyond dispute or found by other courts, adequately demonstrate that defendants exercised their public authority in the premises responsibly and with fairness to plaintiffs, without violation of any of plaintiffs' rights under the United States Constitution, or otherwise. The idea that some kind of conspiracy was involved, or that the contracting with a single concessionaire for golf shop services created a "monopoly" of any legal significance, is pure fancy.

Defendants move for an order requiring plaintiffs to pay their expenses, including attorney's fees, on these motions. While such might well be justified, there is no specification, and any proceedings for the purpose of determining reasonable allowance would involve more unjustified time and expense. For that reason alone, such motion for expenses must be denied, subject to reconsideration if any further proceedings become necessary in this court.

Accordingly, IT IS ORDERED that plaintiffs motions for leave to amend the complaint herein and to open, alter or amend the decision herein of June 1, 1976, are DENIED.

IT IS FURTHER ORDERED that defendants' motion for an order for expenses is DENIED.

/s/ ROBERT D. MORGAN
United States District Judge

Entered: June 30, 1976

APPENDIX N

1970 Illinois Constitution

Article IX, Revenue, Sec. 5

* * *

(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971.

15 United States Code

§ 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by section 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court.

15 United States Code

§ 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the

several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 United States Code

§ 15

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

42 United States Code

§ 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Ch. 105, § 8-10, Ill.Rev.Stat. (1975)

All park districts shall have power to plan, establish and maintain recreational programs, provide musical concerts, to construct, equip and maintain airports, landing fields for aircraft, armories, field houses, gymnasiums, assembly rooms, comfort stations, indoor and outdoor swimming pools, wading pools, bathing beaches, bath houses, locker rooms, boating basins, boat houses, lagoons, skating rinks, piers, conservatories for the propagation of flowers, shrubs, and other plants, animal and bird houses and enclosures, athletic fields with seating stands, golf, tennis, and other courses, courts, and grounds, and the power to make and enforce reasonable rules, regulations, and charges therefor. The express enumeration of each of the foregoing recreational facilities and equipment which park districts are herein given the power to provide shall not be construed as a limitation upon said park districts, nor prohibit any park district from providing any other facilities or equipment which may be appropriate for park purposes in any park of said district, nor shall the same in any way be held to limit the power and authority conferred upon park districts under other sections of this code.

Ch. 105, § 9.1-1, Ill.Rev.Stat. (1975)

Any park district has the power subject to the limitations of Sections 9.1-1 through 9.1-6 of this Article to acquire, construct and operate golf courses and toilet, locker and other necessary facilities pertinent thereto, and extend or improve such courses and facilities, borrow money, and as evidence thereof to issue its bonds, payable solely from the revenue derived from the operation of such golf courses and facilities. These bonds may be issued in such amounts as may be necessary to provide sufficient funds to pay all the costs of the acquiral or construction, or extension or improvement of golf courses and facilities, including engineering, legal, and other expenses, together with interest on the bonds to a date 6 months subsequent to the estimated date of the completion. The bonds are negotiable instruments and shall be executed by the president and secretary of the district and countersigned by the treasurer.

Ch. 127, §§ 132.5 and 132.6, Ill.Rev.Stat. (1975)

§ 132.5

All purchases, contracts or other obligations or expenditure of funds by any State agency shall be in accordance with rules and regulations governing such State agency procurement practices and procedures which it shall promulgate and publish in sufficient number for distribution to persons interested in bidding on purchases or contracts to be let by such State agency. . . .

§ 132.6

The rules and regulations required by Section 5 of this Act may provide that prospective bidders be prequalified to determine their responsibility, as required by this Act, and shall provide, among other matters which are not in conflict with the policies and principles herein set forth:

a. That all purchases, contracts and expenditure of funds shall be awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, quality and serviceability except as provided in paragraphs e., f. and g. of this Section. . . .

Supreme Court, U. S.
FILED
DEC 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-440

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, an Illinois Political Subdivision, JOHN R. CANTERBURY, JAMES A. CUMMINGS, BONNIE W. NOBLE, CLYDE WEST, HAROLD A. (PETE) VONACHEN, JR., Individually and Members of the Board of Trustees of the Pleasure Driveway and Park District of Peoria; RHODELL E. OWENS, Individually and as Director of Parks and Recreation; JACK M. FULLER, Individually and as Administrative Assistant; DANIEL B. OHLEMILLER, Individually and as Business Administrator; FRANK D. BORROR, Individually and as Superintendent of Maintenance; WILLIAM McD. FREDERICK, Individually and as Attorney of Pleasure Driveway and Park District of Peoria; GOLF SHOP MANAGEMENT, INC., an Illinois Corporation; and GORDON RAMSEY,
Petitioners,

v.

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES and RICHARD HOADLEY,
Respondents.

On Peition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

PETITIONERS' SUPPLEMENTAL BRIEF

At pages 6, 14, 20 and 23 and in Appendixes J and I of the Petition for Writ of Certiorari filed herein, reference is made to State Circuit Court case No. 75 L 2893 and the appeal there-

from State Appellate Court case No. 76-14. Attached hereto as Appendix AAA is the Illinois Supreme Court's denial in case No. 50022, of Respondents' petition for leave to appeal that case. Respondents have now exhausted all of their Appellate rights in the State Courts and the third District Appellate Court's opinion stands as final as set forth in the Petition for Certiorari.

Respectfully submitted,

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Dated: December . ., 1977

APPENDIX

APPENDIX AAA

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Clerk

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November 23, 1977

Kavanagh, Scully, Sudow,
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No. 50022—Pleasure Driveway and Park District of Peoria, respondent, vs. Edwin Jones, et al., petitioners. Leave to appeal, Appellate Court, Third District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

CLELL L. WOODS
Clerk of the Supreme Court

Supreme Court, U. S.
FILED
OCT 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-440

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, AN ILLINOIS POLITICAL SUBDIVISION, JOHN R. CANTERBURY, JAMES A. CUMMINGS, BONNIE W. NOBLE, CLYDE WEST, HAROLD A. (PETE) VONACHEN, JR., INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF TRUSTEES OF THE PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA; RHODELL E. OWENS, INDIVIDUALLY AND AS DIRECTOR OF PARKS AND RECREATION; JACK M. FULLER, INDIVIDUALLY AND AS ADMINISTRATIVE ASSISTANT; DANIEL B. OHLEMILLER, INDIVIDUALLY AND AS BUSINESS ADMINISTRATOR; FRANK D. BORROR, INDIVIDUALLY AND AS SUPERINTENDENT OF MAINTENANCE; WILLIAM McD. FREDERICK, INDIVIDUALLY AND AS ATTORNEY OF PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, GOLF SHOP MANAGEMENT, INC., AN ILLINOIS CORPORATION; AND GORDON RAMSEY,

Petitioners,

vs.

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES AND RICHARD HOADLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

JOHN E. CASSIDY, JR.,
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Telephone: 309/676-0591,
Attorney for Respondents.

October 18, 1977.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

PAGE

Statement of the Case 1

Argument:

I.

Petitioners are not entitled to status-oriented exemption from the federal antitrust laws and this case is not controlled by *Parker* v. *Brown*, 317 U. S. 341 and its progeny 7

II.

The decision below conforms to *Perry* v. *Sinderman*, 408 U. S. 593, and *Mt. Healthy City School District* v. *Doyle*, ... U. S. and there is no reason for granting the writ 10

III.

Part III of the Petition is misleading and immaterial and any possible claims thereunder were expressly waived by petitioners' counsel in the courts below 12

Conclusion 15

INDEX TO CITATIONS.

Aldinger v. *Howard*, 427 U. S. 1 6

Board of Regents v. *Roth*, 408 U. S. 564 ..... 10, 11

Brunton v. *Hable*, 333 Ill. App. 333, 77 N. E. 2d 566 4

California Motor Transport v. *Trucking Unlimited*, 404 U. S. 508 ..... 11, 12

Cantor v. *Detroit Edison Co.*, 428 U. S. 579 ..... 6, 9
City of Lafayette, Louisiana v. *Louisiana Power & Light Co.*, 532 F. 2d 431 (5th Cir., 1976) 6, 8, 10
Deisenroth v. *Dodge*, 350 Ill. App. 20, 111 N. E. 2d 577 .. 4
Duke & Company v. *Foerster*, 521 F. 2d 1277 (3d Cir., 1975) 6
Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 5
Fitzgerald v. *Quinn*, 165 Ill. 354, 46 N. E. 287 4
Freeman v. *Bee Machine Co.*, 319 U. S. 448 14
General Investment Co. v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261 14
Goldfarb v. *Virginia State Bar*, 421 U. S. 773 ..... 6, 8
Hammond v. *Doty*, 184 Ill. 246, 56 N. E. 371 4
Kenosha v. *Bruno*, 412 U. S. 507 6
Lindsey v. *Normet*, 405 U. S. 56 11
Lyons v. *Westinghouse Electric Corp.*, 222 F. 2d 184 (2d Cir., 1955) 14
Maryland Public Research Group v. *Elkins*, 430 F. Supp. 387 (D. Md., 1976) 11
Monroe v. *Pape*, 365 U. S. 167 6
Moor v. *Alameda County*, 411 U. S. 693 6
Mt. Healthy City School District v. *Doyle*, ... U. S. ..... (1977) 10, 12
Parker v. *Brown*, 317 U. S. 341 ..... 5, 7, 8, 9
Perry v. *Sinderman*, 408 U. S. 593 ..... 10, 11
Pleasure Driveway & Park District v. *Kurek*, 27 Ill. App. 3d 60, 325 N. E. 2d 650 ..... 4, 5
Union Pacific R. Co. v. *United States*, 313 U. S. 450 9

IN THE

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OCTOBER TERM, 1977

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Petitioners,

vs.

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES AND RICHARD HOADLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

STATEMENT OF THE CASE.

Petitioners' "Statement Of The Case" and part III of their "Reasons For Granting The Writ" are so misleading, irrelevant

and immaterial as to defy correction and argument. The material facts are accurately stated in the opinion of the Court of Appeals [Pet. App. A-4 thru A-7] and the pleadings are correctly summarized [Pet. App. A-8] thusly:

> [T]his case does not present the question of whether a public agency may grant a monopolistic concession license without violating the antitrust laws, where no more is alleged or proved.[1] Nor does the case simply involve a public agency's attempt to increase operating revenues by increasing concession fees uniformly to its competing concession licensees. The case does involve both of these elements, the defendants urge us to decide the case as if it involved no more, and the district court in dismissing the case, apparently accepted this characterization of the issues raised. But more than that is alleged by *the complaint*, which *charges that the threat of a monopolistic license to GSM and the demand for uniformly increased fees were used by the defendants as means in a broader conspiracy to coerce plaintiffs into raising and fixing their retail prices and that the award of the GSM license was made to punish plaintiffs for refusing to be so coerced.* Acts which may be legal and innocent in themselves, standing alone, lose that character when incorporated into a conspiracy to restrain trade. (Citations.) [Emphasis added.]

The petitioner Pleasure Driveway & Park District of Peoria, Illinois [called Park District] is a special unit of local government within the meaning of the Illinois Constitution. It has no powers other than those delegated by Illinois statute and its revenue powers are limited to the levying of property taxes

1. In a prior appeal to the 7th Circuit, that court vacated and remanded the District Court's dismissal with prejudice and thereafter the District Court granted respondents' request to dismiss without prejudice to their right to refile. [Pet. App. D & E, A-37 *et seq.*] Throughout, petitioners claim some type of *res adjudicata* [see e.g. Pet. 26] or conflict between this and the prior decision of the 7th Circuit [Pet. 14-15]. Assuming a vacated judgment can adjudicate something, the fact of the matter is that the prior complaint did not involve what's involved here. It only "present(ed) the question whether a public agency may grant a monopolistic concession license".

[Ill. Rev. Stat. 1973, Chap. 105 §§ 6-1 *et seq.*] and the charging of fees for the use of its facilities [Ill. Rev. Stat., 1973, Chap. 105 § 8-1(h)].

Respondents, 5 PGA accredited golf professionals, were employed by the Park District as greenskeepers at its 5 public golf courses. They were also granted proprietary pro shop concession rights at the golf course where each was assigned to perform the duties of his employment. During the entirety of their tenancies and tenures (totaling some 83 years) respondents were horizontal retail competitors and between them they constituted the entire public market in Peoria, Illinois for high quality "pro line" merchandise.[2] Moreover, they were required to maintain substantial investments in their inventories, equipment and supplies which required from 3 to 5 years for realization on a going concern basis.

Section 5 of article IX of the Illinois Constitution of 1970 abolished the personal property tax and the Illinois legislature rejected several requests by local park districts for substitute revenues. This led the Park District, in 1973, to consider the possibilities of obtaining greater revenues from the pro shop concessions.

From 1959 to 1973 each respondent operated his pro shop under a series of 1 year agreements whereby 4 of them paid a yearly fee of $600 and the other, who was assigned to a 9 hole course, paid $300. In the late summer and fall of 1973 the Park District revised the fee arrangement and in a confusing and less than harmonious series of negotiations respondents agreed to pay 1½% of their gross receipts.[3]

At about the same time, Park District agents and petitioner Golf Shop Management, Inc. [called GSM] agreed that GSM would make an economically unrealistic proposal to pay

2. Manufacturers of golf equipment and supplies limit retail distribution of quality "pro line" products through golf course pro shops only.

3. See: *Pleasure Driveway & Park District* v. *Kurek*, 27 Ill. App. 3d 60, 325 N. E. 2d 650 (3/27/75).

$90,000 a year to monopolize respondents' business rights as of January 1, 1974. Public bidding specifications which discriminated against the respondents[4] and which were tailored exclusively for the GSM proposal were designed and advertised. They provided that bids must be submitted on December 17, 1973 and that a special Park District Board meeting would be held on December 19 to act thereon. Respondents could not, and did not, make an offer and on December 17, 1973, GSM formalized its $90,000 proposal as a bid. The meeting scheduled for December 19 was never held.

Thereafter, the GSM proposal was coercively laced with respondents' unrealized investments and the threat that their concession rights would not be renewed and was used to induce each of them to enter into illegal sales taxing and price fixing agreements with the Park District. Finally, on January 16, 1974, the Park Board declared that unless each respondent agreed to pay 5% of his gross receipts and to turn his pricing policies over the Park District by 8 a.m., January 19, 1974, his concession rights would be awarded to GSM.

Respondents refused to be so coerced and their businesses were terminated on January 19, 1974 "with the stated intention of continuing (their) employment as greenskeepers."[5] They were served with 30 days notices to terminate their respective tenancies on January 21 and the GSM contract was executed on January 23, 1974.

Under Illinois forcible entry and detainer law the party in possession of premises is entitled to the presumption that he is rightfully there and he who disputes that possessory right has the burden to plead and prove his claim.[6] In order to present

4. 50% of respondents' annual earning derived from their greenskeepers' salaries and the bid specs. provided that if any employee made the successful bid, he would, *ipso facto,* lose his employment.

5. Quote is from *Pleasure Driveway & Park District* v. *Kurek,* 27 Ill. App. 3d at 62, 325 N. E. 2d 650.

6. *Hammond* v. *Doty,* 184 Ill. 246, 56 N. E. 371; *Fitzgerald* v. *Quinn,* 165 Ill. 354, 46 N. E. 287; *Deisenroth* v. *Dodge,* 350 Ill. App. 20, 111 N. E. 2d 575; *Brunton* v. *Habel,* 333 Ill. App. 333, 77 N. E. 2d 566.

their defenses to the Park District's claim for possession respondents refused to voluntarily vacate their respective premises. Accordingly, the Park District filed its Forcible Entry and Detainer suit in the state court on February 20, 1974 and terminated respondents' employment as greenskeepers on the same date.

Respondents prevailed in a 3 week jury trial in the forcible detainer action and the Park District appealed. The Illinois Appellate Court determined that the defenses were not germane to the narrow issue of possession and reversed [*Pleasure Driveway & Park District* v. *Kurek,* 27 Ill. App. 3d 60, 325 N. E. 2d 650 (3/27/75)]. Leave to appeal was denied by the Illinois Supreme Court on June 27, and respondents were judicially evicted on June 30, 1975.

Respondents brought this action in 2 counts. Count I is under 15 U. S. C. §§ 1, 2, 15 and 16 and, in summary, claims that they were terminated "because, on January 19, 1974, they refused to be coercively induced into levying unlawful 5% sales tax levies on their business consumers and because they refused to contract, combine or conspire with the effect of raising, fixing and maintaining their proprietary resale, rental and services prices" [Complaint, par. 25 (Pet. App. A-6)]. Count II is against the individual officers, administrators and attorney of the Park District. It is under 42 U. S. C. § 1983 and the Petition and Due Process Clauses of the First and Fourteenth Amendments and, in summary, it claims that respondents "were summarily terminated from their public employment positions because they asserted their rights of petition and to due process by litigating their defenses to the Park District's forcible entry and detainer action." [Pet. App., A-22.]

The District Court dismissed the antitrust claim with prejudice on the basis of petitioners' misstatement of the case and *Parker* v. *Brown,* 317 U. S. 341 (1943) and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961) and their progeny. It dismissed the constitutional

claim on the grounds that the Park District is not a person within the meaning of 42 U. S. C. § 1983[7] and that the individual defendants were protected by a previous state court adjudication [Pet. App. A-3, A-22 & A-23]. The 7th Circuit reversed and remanded as to both counts.

In its analysis of Count I the Court of Appeals relied on *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975); *Duke & Company, Inc.* v. *Foerster*, 521 F. 2d 1277 (3d Cir. 1975); *City of Lafayette, Louisiana* v. *Louisiana Power & Light Company*, 532 F. 2d 431 (5th Cir., 1976)[8] and analogized to *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976) and concluded:

> Nothing in the Illinois statutory provisions governing park districts even remotely suggests that Illinois has authorized, let alone compelled, park districts to enrich themselves by coercing horizontal retail competitors operating under concession licenses to fix retail prices in what would otherwise be a plain violation of the Sherman Act. * * * That the Park District's conduct concerned its golf courses and involved its statutory powers to contract and/or lease surely does not convert Illinois grant of such powers into state authorization or mandate to use them to force private competitors to violate the antitrust law. [Pet. App. A-14 and A-15.]
>
> This conclusion is strengthened by the complaint's allegations that the Park District, in demanding 5% of gross sales as a concession fee and requiring as a condition of concession renewal that plaintiffs raise and fix their prices * * * was effectively attempting to impose on the Peoria golfing public a 5% hidden sales tax that is illegal under Illinois law. * * * If it can be proven that the concession fee's intended incidence would have operated as an illegal sales tax, it would be extremely difficult, if not impossible, to find a state mandate underlying the Park District's alleged conduct. [Pet. App. A-15.]

7. There is no dispute about this in light of *Kenosha* v. *Bruno*, 412 U. S. 507; *Moor* v. *Alameda County*, 411 U. S. 693; *Monroe* v. *Pape*, 365 U. S. 167 and the rationale of *Aldinger* v. *Howard*, 427 U. S. 1.

8. Cert. granted ..... U. S. ..... [45 USLW 3647 (No. 76-864, 3/28/77)].

As to Count II, the court below held that the individual defendants were neither parties nor privies in the state court suit thus making the doctrine of *res adjudicata* inapplicable and that "Nothing in th(e) state court judgments supports the district court's conclusion that it had been previously adjudicated that 'the exercise of the right to litigate issues' was not the reason for plaintiffs' employment discharges." [Pet. App. A-23 and A-24.]

ARGUMENT.

I.

Petitioners contend that the "Court in *Parker* v. *Brown*, *supra*, recognized Congress's concern and intent in holding that the antitrust laws do not apply to otherwise valid governmental action" [Pet., 12]. In order to supply the "valid governmental action" they go on and misstate the case thusly:

> The Park District was involved in a valid governmental function of operating public golf courses on public land for public benefit when its elected trustees, in carrying out their official duties with which they are charged, awarded the right to operate the golf pro shops at the 5 public courses, which it owned to Golf Shop Management, Inc., the highest bidder as required by Illinois Public Bidding Act ch. 127, § 132.1 *et seq.* Ill. Rev. Stat. (1975)[9] [Pet., 11].

But here, the Park District "attempted to enrich (itself) by coercing horizontal retail competitors operating under concession licenses to fix retail prices in what would otherwise be plain violation of the Sherman Act" and the 7th Circuit held that "Nothing in the Illinois statutory provisions governing park districts even remotely suggests that Illinois has authorized, let alone compelled" such conduct [Pet. App. A-14].

9. If this were the case, then why did the petitioners use "the highest bidder" in the abortive attempt to coerce the non-bidding respondents into *per se* violations of section 1 of the Sherman Act.

How can petitioners persist in their refusal to recognize the case and in the same breath ask the Supreme Court of the United States to grant plenary review? They contend that "The decision below conflicts with Parker v. Brown and decisions in other circuits, misapplies Goldfarb and Cantor, and conflicts with the Seventh Circuit's own decisions in this case's predecessor and Metro Cable" [Pet., 9 *et seq.*] but they provide no basis for analysis.

The Petition asserts nothing more than the claim that the Park District is entitled to status-oriented rather than activity-oriented immunity under the federal antitrust laws and that review should be granted because it has been granted in *City of Lafayette, Louisiana* v. *Louisiana Power & Light Co.*, 532 F. 2d 431 (5th Cir. 1976). This case is not the same as *City of Lafayette, supra.*

Consistent with *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975) and its progeny, the 7th Circuit has here held that the Park District is not entitled to status-oriented immunity and that the fact "That the Park District's conduct concerned its golf courses and involved its statutory powers to contract and/or lease surely does not convert Illinois' grant of such powers into state authorization or mandate to use them to force private competitors to violate the antitrust law." [Pet. App., A-15.] The opinion below was cited at page 11 of the "Brief For The United States as Amicus Curiae" in *City of Lafayette* v. *Louisiana Light & Power Co., supra,* [Supreme Court No. 76-864] for the proposition that a status-oriented "Rule would require federal policy to yield to a variety of local decisions that may have little to do with an articulable state policy and that may be severely detrimental to the interests protected by federal law."

Petitioners rely on the "*valid* governmental action" [emphasis added] language of *Parker* v. *Brown*, 317 U. S. 341. Yet the *Parker* decision itself states that a State cannot give immunity to those who violate the Sherman Act "by declaring that their

action is lawful (citations) and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." This is what petitioners refer to when they say that "The only exception which the court (*sic*) in *Parker* v. *Brown* anticipated was based on its previous decision in *Union Pacific R. Co.* v. *United States*, 313 U. S. 450 (1941)" [Pet., 12].

In *Union Pacific R. Co., supra,* the Court held that a city violated a federal statute when it made certain concessions to private enterpreneurs who agreed to move their businesses to the city's new market area and even though the city acted in what it perceived to be in the general economic welfare the Court ruled that it (the city) became a participant in a private conspiracy thereby exposing it to liabilities under federal law.

Respondents were proprietary businessmen, they engaged in horizontal retail competition, they provided the exclusive retail outlets for their product in the relevant market and they received their inventories *etc.* through the interstate flow of commerce. In sum, they were, in all respects, subject to the Sherman Act. And the fact that they held their rights under grant of a unit of local government did not make them immune from liabilities imposed by the Clayton Act because "This Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law." [*Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976)].

This case can only be tested as if respondents had succumbed to the coercion and entered into the contracts with the Park District in *per se* violation of section 1 of the Sherman Act. Had that occurred, we would have a "municipality becoming a participant in (5) private agreement(s) . . . for restraint of trade" [*Parker* v. *Brown*, 317 U. S. at 351] and petitioners' claim that "the decision below conflicts with *Parker* v. *Brown* and . . . misapplies Goldfarb and Cantor" is without foundation in fact.

If this case stands for anything beyond its own parameters, it stands for the proposition that the opinion and judgment of the 5th Circuit in *City of Lafayette* v. *Louisiana Power & Light Co.*, 532 F. 2d 431 (U. S. Supreme Court No. 76-864) must be affirmed.

II.

Under part II of "Reasons For Granting The Writ" petitioners contend that "Respondents Were Not Deprived Of Their Civil Rights . . . Where No Property Right in Such Employment Is Alleged and Where Numerous Valid Reasons Exist for Such Discharges Even Though One of the Reasons Is Alleged to Have Been a Protected Right" [Pet. 16]. They rely upon *Board of Regents* v. *Roth*, 408 U. S. 564 (1972) and *Mt. Healthy City School District* v. *Doyle*, ... U. S. ..... (1977) and argue as follows:

1. Respondents had no protected property interest in their jobs as required by *Roth*.
2. Under *Mt. Healthy* the test "is whether the protected conduct was the *sine qua non* for the discharge" and "The Court of Appeals test is whether the protected conduct 'to some extent at least' is a factor in the dismissal."
3. Thus, the 7th Circuit is wrong and "This Court has the opportunity here to give direction to its circuit courts so that the important doctrines of *Roth* and *Mt. Healthy* are completely understood and followed throughout the circuits."

The petitioners—not the 7th Circuit—are the ones who misunderstand and need direction concerning "the important doctrines of *Roth* and *Mt. Healthy*". By couching their position in terms of *Board of Regents* v. *Roth*, 408 U. S. 564 (1972) rather than in terms of *Perry* v. *Sinderman*, 408 U. S. 593 (1972), they hopelessly hybrid and confuse the issues and principles involved. The following from *Mt. Healthy City School District* v. *Doyle*, ... U. S. ..... (50 L. Ed. 2d at 481) makes the distinction plainly clear:

> Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. *Perry* v. *Sinderman*, 408 U. S. 593 (1972).

There is no claim here that respondents' governmental employment terminations deprived them of "any protected property right" within the meaning of *Board of Regents* v. *Roth*, *supra*. The claim here is that respondents had the right to litigate their defenses to the Park District's forcible detainer suit under the Petition and Due Process Clauses of the First and Fourteenth Amendments [*California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510 (1972); *Lindsey* v. *Normet*, 405 U. S. 56, (1971); *Maryland Public Research Group* v. *Elkins*, 430 F. Supp. 387, 393 (D. Md. 1976)] and that petitioners would not have terminated them but for their constitutionally protected conduct.

Furthermore, petitioners are equally wrong in claiming that under *M. Healthy* the test "is whether the protected conduct was the *sine qua non* for the discharge" and that the 7th Circuit erred because its "test is whether the protected conduct 'to some extent at least' is a factor in the dismissal." [Pet. 17.] Here again the court below followed *Mt. Healthy* to the letter and, on remand, petitioners will have the burden of proving that they would have discharged respondents "even in the absence of the protected conduct," *viz*:

> Initially . . . the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'

> —or, to put it in other words, *that it was a 'motivating factor' in the Board's decision* not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine *whether the Board had shown* by a preponderance of the evidence *that it would have reached the same decision as to respondent's employment even in the absence of the protected conduct.* [*Mt. Healthy City School District* v. *Doyle, supra,* 50 L. Ed. 2d at 484 (emphasis added)].

For the foregoing reasons the 7th Circuit was clearly correct and the petitioners have failed to even suggest why the writ should be granted to review the constitutional claims.

III.

Part III under "Reasons For Granting The Writ" is but another episode in petitioners' continuing "pattern of baseless, repetitive claims" that are being used as an anticompetitive device to prevent respondents from having an adjudicatory trial on the merits [See: *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, 513]. In essence, they are asking this Supreme Court of the United States to resolve in their favor what they claim are disputed fact questions on the pleadings. This part of the Petition is masively deceptive and misleading and respondents, while not able to qualify to proceed *in forma pauperis,* are far from able to carry the burden of the printing costs necessary to point out each and every instance of material misrepresentation of fact. The following example should suffice.

At pages 19-20 the Petition states: "GSM via a successful bid as required by the Public Bidding Act, in fact obtained the concession rights. The contract (cite) requiring a performance bond in the amount of $125,000 and an increased rent (to date GSM has paid the park district $120,000 which is 10 times the most ever received from the [golf pros] over a similar period) was executed and no allegation was made by the [golf pros] that it was not being performed." This statement is false in fact and

is wholly unsupported in the record. The deceptive device employed was to cite to "Petition for Rehearing *en banc* pages 5 and 6" to which respondents, under Rule 40 of the Federal Rules of Appellate Procedure, could not respond. On this record, the only relevant facts appear in paragraphs 19(a) and 29 of the complaint, *viz*:

> Without prior appropriation and otherwise in violation of Const. of Ill. 1970 Art. VIII §§ 1(a) & 1(b) and Ill. Rev. Stat., Chap. 105 §§ 4-4 & 4-6 substantially more than $215,000 of local governmental funds, credit and property has been misused to subsidize the proprietary interests of GSM.

> The Concession Agreement with GSM is an exclusive or monopolistic commercial license and was induced by monumental private and public frauds, as aforesaid, including the continuing deceit that it ever has, can or will, result in payments of $90,000 a year by GSM to, for or on behalf of the constituency of the Park District.

The essence of part III of the Petition is that "The Court of Appeals fails to give serious consideration to the prior federal opinions or the state court decisions, as well as Illinois law, but at the same time, shows the Court's willingness to construct a cause of action for the golf pros." At the oral argument before the 7th Circuit the following transpired:

> JUDGE PELL: Are you, excuse me for interrupting but you got—you have a limited time here to get to the ultimate issue, are you relying primarily on *Noerr—Pennington* or are you relying upon the fact of *res adjudicata* some way out of the fact that they could have litigated the antitrust issue in the state proceedings?
>
> MR. ALTENBERGER:[10] We are not relying on the fact that they could have litigated the antitrust proceedings.
>
> JUDGE PELL: So (you) are relying on *Noerr—Pennington* primarily on count I?

---

10. Petitioners' attorney here and in the courts below.

MR. ALTENBERGER: We are relying on the *Parker* v. *Brown* doctrine and its progeny going through *Noerr—Pennington*. Yes, your Honor.[11]

In any event, jurisdiction over federal antitrust claims lies exclusively in the courts of the United States [See *e.g.*: *Freeman* v. *Bee Machine Co.*, 319 U. S. 448; *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261]. As stated by Judge Learned Hand in *Lyons* v. *Westinghouse Electric Corp.*, 222 F. 2d 184, 189 (2d Cir., 1955):

> In the case at bar it appears to us that the grant of the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; at least on occasions like those at bar, where the putative estoppel includes the whole nexus of facts that make up the wrong. The remedy provided is not solely civil; ⅔rds, of the recovery is not remedial and inevitably presupposes a punitive purpose. It is like a *qui tam* action, except that the plaintiff keeps all the penalty, instead of sharing it with the sovereign. There are sound reasons for assuming that such recovery should not be subject to the determinations of state courts. It was part of the effort to prevent monopoly and restraints of commerce, and it was natural to wish it to be uniformly administered, being national in scope. . . . Obviously, an administration of the Acts at once effective and uniform would best be accomplished by an untrammeled jurisdiction of the federal courts.

---

11. The 7th Circuit tape records oral arguments and the recording is part of the record. By 7th Circuit order entered September 21, 1977, respondents were granted leave to make a tape recording copy of the recording in the record and this is the source of the quoted colloquy.

CONCLUSION.

For the foregoing reasons, and for others implicit therein, respondents request that the Petition For Writ Of Certiorari be denied.

Respectfully submitted,

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October 18, 1977.

Supreme Court, U. S.
FILED
OCT 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-440

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, an Illinois Political Subdivision, JOHN R. CANTERBURY, JAMES A. CUMMINGS, BONNIE W. NOBLE, CLYDE WEST, HAROLD A. (PETE) VONACHEN, JR., Individually and Members of the Board of Trustees of the Pleasure Driveway and Park District of Peoria; RHODELL E. OWENS, Individually and as Director of Parks and Recreation; JACK M. FULLER, Individually and as Administrative Assistant; DANIEL B. OHLEMILLER, Individually and as Business Administrator; FRANK D. BORROR, Individually and as Superintendent of Maintenance; WILLIAM McD. FREDERICK, Individually and as Attorney of Pleasure Driveway and Park District of Peoria; GOLF SHOP MANAGEMENT, INC., an Illinois Corporation; and GORDON RAMSEY,
Petitioners,

v.

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES and RICHARD HOADLEY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Argument 1

Conclusion 9

Appendix AA—Unpublished Opinion of the Illinois Supreme Court in Illinois v. Borchers (Sept. 20, 1977)... A-1

Table of Authorities

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 4

Collidotronics, Inc. v. Stuyvesant Insurance Company, 290 F.Supp. 978 (DC-Pa. 1968), affirmed 412 F.2d 1186 (CA 3, 1969) 7

Daniels v. Thomas, 225 F.2d 795 (CA 10, 1955) 7

Grubb v. Public Utilities Commission of Ohio, 281 U.S. 470 (1930) 7

Hanna v. Home Insurance Company, 281 F.2d 298 (CA 5, 1960) 8

Hendron v. Yount-Lee Oil Co., 108 F.2d 759 (CA 5, 1940) 8

Illinois v. Borchers, — Ill.2d — (Sept. 20, 1977, No. 48666) 7

Mt. Healthy City School District v. Doyle, — U.S. — (1977) 3

Perry v. Sinderman, 408 U.S. 593 (1972) 3

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 8

Singer v. A. Hollander & Son, Inc., 202 F.2d 55 (CA 3, 1953) 7

Skolnick v. Martin, 32 Ill.2d 55 (1965) 7

Williams v. Tooke, 108 F.2d 758 (CA 5, 1940) 8

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

ARGUMENT

This reply to respondents' brief in opposition is filed for the purpose of indicating to this Court that in the new matter contained in respondents' brief there are serious errors associated with respondents' attack on petitioners' Statement of the Facts

and reasons for granting the Writ of Certiorari set forth in Point III of the petition. Petitioners' Statement of the Case and Part III of the Reasons for Granting the Writ are completely accurate, supported by findings of the state courts after full evidentiary hearings, and supported by state Appellate Courts' affirming opinions. The statement of the case relied on by respondents as contained in the Seventh Circuit Court of Appeals opinion is merely a recitation by that court of unproved allegations in respondents' complaint which seeks to relitigate already decided facts. Contrary to respondents' statement at page 12 of their brief that petitioners

> "Are asking this Supreme Court of the United States to resolve in their favor what they claim are disputed fact questions on the pleadings."

Petitioners are asking this Court to recognize, and ultimately remedy, the serious consequences of the Seventh Circuit's decision which, if allowed to stand, permits the respondents to litigate claims, the operative facts of which have been thoroughly litigated and relitigated in petitioners' favor at all levels of the state courts.

We stand squarely behind the accuracy and completeness of every statement and every quotation from state court actions and from reported cases that we have made. The brief for respondents in opposition to our petition misstates the Seventh Circuit Opinion, the Illinois Constitution, the decisions of the Illinois State Courts, and the cited decisions of this Court. We believe all of those misstatements, misquotes and misinterpretations are patent in the documents and decisions to which they refer.

Page 9 of respondents' brief in opposition states:

> "This case can only be tested as if respondents had succumbed to the coercion and entered into contracts with the park district . . ."

Such an assumption or such a test is pure supposition and never came to pass. In fact the state courts held the negotiations for such contracts to be valid, although unsuccessful, negotiations. The proposition that a lawsuit may be based upon assumed facts is without merit.

We have already discussed *Mt. Healthy City School District v. Doyle*, — U.S. — (1977) at length, and we stand by our interpretation. Respondents are mistaken in their interpretation as they stop short of the decisive ruling in that case:

> "We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a 'substantial part' in the actual decision not to renew would necessarily amount to an constitutional violation justifying remedial action. *We think that it would not.* (Emphasis supplied).
>
> "A rule of causation which focuses solely on whether protected conduct played a part 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . . But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." (97 S.C. 568, at 575).

As to respondents' interpretation of *Perry v. Sinderman*, 408 U.S. 593 (1972), the court said in that case:

> "Proof of such a property interest (de facto tenure) would not, of course, entitle him to reinstatement but such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds of his nonretention and challenge their sufficiency."

Here although a grievance procedure was available, respondents failed to ask for a hearing. Suffice it to say the Appellate Court of Illinois for the Third District recognizes this to be the situation as it said in Case No. 76-14 (set out in full at Appendix H, A-61 in the original petition):

> "Furthermore, while various procedures give all park district employees the right to present grievances to the park district the defendants failed to avail themselves of such an opportunity."

In part III of respondents' brief, at page 12, is the worst perversion of the facts that respondents have yet employed. To charge petitioners with "continuing 'pattern of baseless, repetitive claims' that are being used as an anti-competitive device . . ." is a factually baseless attempt to bring the case under this Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The true fact of the matter is that of all the actions that have been brought and all the appeals that have been taken, approximately 22 in number, petitioners brought only those actions and took only the appeal which were necessary to protect the public interest. Petitioners did initiate the original Forcible Entry and Detainer suit, and the recently affirmed damage claim against respondents. The third suit which petitioners initiated was an injunction suit to prevent respondents from continuing filing of harassing possessory actions which resulted in the granting of the injunction and the assessing of attorneys fees against respondents. Respondents initiated all the remaining actions and appeals. Furthermore all of the state court litigation has been decided favorably for petitioners. Therefore, the charge petitioners engaged in a pattern of baseless and repetitive litigation is without foundation.

At page 13 of their brief the colloquy set forth between Judge Pell and Mr. Altenberger during the oral argument in the Seventh Circuit, and the argument that Mr. Altenberger

made an admission waiving collateral estoppel or *res judicata* is an obvious attempt by respondents to divert this Court's attention from the significant issues raised by Part III of the petition. The question asked by Judge Pell was:

> "Are you, excuse me for interrupting but you got—you have a limited time here to get to the ultimate issue, are you relying primarily on *Noerr-Pennington* or are you relying upon the fact of *res judicata* some way out of the fact that they could have litigated the antitrust issue in the state proceedings?"

We suggest that the key words or phrases in Judge Pell's question are: "you have a limited time here . . .": the use of the word "primarily" as opposed to "exclusively"; and the phrase "they could have litigated the antitrust issue in the State Court proceedings". The Seventh Circuit alloted petitioners only 10 minutes to argue the significant issues presented by this case, and these had to be shared with co-counsel. Obviously not all the issues could be argued in depth. So the court was indicating it wanted to hear petitioners' primary, not only, argument, as to the antitrust issue. The petitioners' main argument in Part III of the petition is that the operative facts upon which the antitrust claim is based have been determined by the courts in petitioners' favor, and that the Seventh Circuit erred when it assumed as correct, facts alleged in the Complaint which had been found by the courts to be to the contrary. While this colloquy referred only to the antitrust portions of the controversy it does not amount to an admission of total non-reliance on collateral estoppel by reason of the prior court action as to that issue. There is nothing in the Opinion below which even suggests such a conclusion. To the contrary, the Opinion discusses the substantive issues of both the anti-trust and civil rights claims. Had the Seventh Circuit considered the colloquy to contain an admission, that Court would have made reference to it.

Petitioners would further suggest that the quoted colloquy between Judge Pell and Mr. Altenberger in no way touched petitioners reliance on equitable estoppel as to Count II, nor did it in any way touch the court decisions which negated those essential operable facts which Judge Pell relied on in his opinion as the "sham" contract of GSM, the intent to have respondents fix prices and restrain trade, all of which were previously adjudicated.

The equitable estoppel defense has gained considerable statute by reason of the affirming opinion of the Third District Illinois Appellate Court in the state court litigation between these parties, where that court states:

> "Of the affirmative defenses specified in defendants' answer, error is assigned on appeal only as to the affirmative defense of fraud. However, in their motion to add as additional authority the opinion of the Seventh Circuit Court of Appeals previously referred to, defendants argue that since the Seventh Circuit Court of Appeals has decided that the plaintiffs may be subject to damages for antitrust violations, we should reverse the trial court's dismissal of defendants' affirmative antitrust defenses. We decline to do so. Having failed to initially allege and argue the dismissal of the antitrust defense, defendants have waived whatever assignment of error they might have had to that dismissal. We therefore do not consider whether the affirmative antitrust defense alleged was meritorious."

Petitioners suggest the state Appellate Court action, after respondents had filed the Seventh Circuit's opinion with it and the admissions in respondents' petition in filing the Seventh Circuit's opinion with that Appellate Court make equitable estoppel conclusive as to Count II and conclusive as to the operable facts of Count I.

Respondents further argue, at page 14, that since the federal courts have exclusive jurisdiction of antitrust matters that *res judicata* or collateral estoppel doesn't apply since most of the prior adjudications were by state courts. That argument has two major flaws: First that claim in effect would mean that "exclusive jurisdiction" was a license for lower federal courts to review and "reverse" prior court adjudications and findings of fact underlying and crucial to the attempted statement of an antitrust cause of action. It is one thing to argue that since federal courts have exclusive jurisdiction in antitrust cases, that they alone can consider whether certain allegations state a cause of action under those antitrust laws, but quite another thing to suggest that exclusive jurisdiction is license for a lower federal court to disregard or even "reverse" other court findings which would otherwise preclude the *allegations* set forth to state a cause of action. Not that the prior adjudications preclude the statement of a cause of action, a matter solely in the jurisdiction of federal courts, but that certain underlying facts are adjudicated and cannot, with due respect for the other courts, be altered or reversed to attempt to state a cause of action. *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470 (1930); *Daniels v. Thomas*, 225 F.2d 795 (CA 10, 1955); *Singer v. A. Hollander & Son, Inc.*, 202 F.2d 55 (CA 3, 1953); *Collidotronics, Inc. v. Stuyvesant Insurance Company*, 290 F.Supp. 978 (DC-Pa. 1968), affirmed 412 F.2d 1186 (CA 3, 1969); See also *Skolnick v. Martin*, 32 Ill.2d 55 (1965) and *Illinois v. Borchers*, — Ill.2d — (Sept. 20, 1977, No. 48666).* Here those facts have been determined, and the allegations have been adjudicated as false and unsupported, yet the Court of Appeals assumed them as true. Clearly that court and the respondents confuse the judgment of whether an antitrust cause of action is stated (one within the federal courts' exclusive jurisdiction) with the findings of certain basic facts which serve as fundamental elements of the complaint itself (there *no* court has an exclusive right to determine the truth or falsity of such

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* The *Borchers* opinion is attached hereto as Appendix AA since it has not yet been published.

allegations, *but* after once being determined, the doctrines of *res judicata* and collateral estoppel, to avoid multiplicity of actions, minimize the waste of judicial resources, afford the public and the parties the security of the judgments they are entitled to, and *avoid inconsistent results*, dictate that they can not be reconsidered except by proper and timely appellate review) *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Hanna v. Home Insurance Company*, 281 F.2d 298 (CA 5, 1960); *Williams v. Tooke*, 108 F.2d 758 (CA 5, 1940); and *Hendron v. Yount-Lee Oil Co.*, 108 F.2d 759 (CA 5, 1940).

The second flaw however is more significant in light of the circumstances of this case and the argument in Part III of the Petition which respondents have disputed, namely that for a federal court to utilize the license referred to above to reverse or undermine the prior court decisions is the essence of the abuse of the doctrines of comity and full faith and credit which we have earlier emphasized. Such a tension cannot be permitted by this Court under the guise of some attenuated doctrine of "exclusive jurisdiction" to determine elemental facts in disregard of prior adjudications.

CONCLUSION

For the foregoing reasons, and those set forth in the original petition, a writ of certiorari should be granted.

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Dated: October 24, 1977

APPENDIX

APPENDIX AA

OPINION

SUPREME COURT
OF ILLINOIS

United States of America

State of Illinois
Supreme Court } ss

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the twelfth day of September in the year of our Lord, one thousand nine hundred and seventy-seven, within and for the State of Illinois.

Present: Daniel P. Ward, Chief Justice

Justice Robert C. Underwood Justice Joseph H. Goldenhersh

Justice Howard C. Ryan Justice William G. Clark

Justice Thomas J. Moran Justice James A. Dooley

William J. Scott, Attorney General

Louie F. Dean, Marshal

Attest: Clell L. Woods, Clerk

BE IT REMEMBERED, that afterwards, to-wit, on the 20th day of September, 1977 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

People State of Illinois,
Appellee,

No. 48666 vs.

Webber Borchers,
Appellant.

Appeal from
Circuit Court
Sangamon County

Clell L. Woods

Clerk of the Supreme Court
State of Illinois

Docket No. 48666—Agenda 7—May 1977.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. WEBBER BORCHERS, Appellant.

MR. CHIEF JUSTICE WARD delivered the opinion of the court:

The defendant, Webber Borchers, was elected to the Illinois House of Representatives in 1968. In the spring and early summer of 1970, he submitted two vouchers to the State of Illinois for payment. The first requested payment of $1,500 to Jeanette Weber for secretarial and clerical services performed for Borchers between September 1, 1969, and January 31, 1970. The second requested that the State pay Miss Weber $150 for secretarial services she performed for the defendant in June of 1970. Both vouchers required Borchers to certify "that the services or materials represented in this voucher were received or authorized, that the amount is correct and hereby approved for payment." Accompanying the vouchers were "bill forms" signed by the defendant in which the purpose or reason for the payment was also stated.

The only secretarial or clerical services performed by Miss Weber for the defendant were the filling out of the two vouchers and the typing of a few letters. Miss Weber did not receive any of the funds obtained from the filing of the vouchers. When the warrants for $1,500 and $150 were sent to her by the State, she endorsed them and turned them over to her employer, Christian Homeier, who was the defendant's seatmate in the legislature. Borchers received approximately $1,200 of the $1,650 from Homeier, and Homeier retained the balance.

In November of 1974, the defendant and Homeier were named as defendants in an 18-count indictment returned in the United States District Court for the Southern District of Illinois. Borchers was charged in two counts with mail fraud (18 U.S.C. sec. 1341 (1970)) and in one count with conspiring with Homeier to violate the mail fraud statute (18 U.S.C. sec. 371 (1970)). In essence the indictment charged that Borchers devised a scheme to defraud the State of Illinois by falsely representing that Jeanette Weber performed secretarial and clerical services for him, that he used the mails in furtherance of the scheme and that he conspired with Christian Homeier to commit the substantive offenses charged in the first two counts. Borchers was tried before a jury and was found not guilty.

In January of 1975 Borchers was indicted in the circuit court of Sangamon County. He was charged in several counts with perjury, theft and official misconduct. This indictment was dismissed on the motion of the State's Attorney, and a superseding indictment charging the same offenses was returned in April of 1975. Defendant was tried in November 1975 in the circuit court of Sangamon County. Prior to trial, all of the counts against the defendant were dismissed on his motion except for three counts charging theft of more than $150, theft of less than $150, and official misconduct. The indictment as it remained charged in substance that Borchers committed two crimes of theft when he submitted the vouchers and received

the money and that he committed official misconduct in that while a member of the legislature he committed the crime of theft. A jury found him guilty on the three charges. The trial court held unconstitutional section 115-4(f) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1975, ch. 38, par. 115-4(f)), which concerns the *voir dire* examination of jurors. Defendant appealed directly to this court under our Rule 302(a), which provides that "[a]ppeals from final judgments of circuit courts shall be taken directly to the Supreme Court (1) in cases in which a statute * * * of this State has been held invalid * * *" (58 Ill. 2d R. 302(a)). Because of the disposition we make of this appeal, we need not consider whether, as the trial court held, the statute unconstitutionally conflicts with our Rule 234 (58 Ill. 2d R. 234). 58 Ill. 2d 302(a).

The defendant contends *inter alia* that the State prosecution was barred by section 3-4(c)(2) of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 3-4(c)(2)), which in part provides:

> "(c) A prosecution is barred if the defendant was formerly prosecuted in a District Court of the United States or in a sister State for an offense which is within the concurrent jurisdiction of this State, if such former prosecution:
>
> * * * * * * *
>
> (2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the prosecution in this State."

The defendant says that this section prohibits "any prosecution by the State in which a fact necessary to convict has been conclusively determined by a prior federal prosecution." His contention is, in effect, that the legislature has extended the doctrine of collateral estoppel to successive prosecution by the Federal and State governments for criminal offenses arising out of the same conduct.

This court recently discussed collateral estoppel in *People v. Williams* (1975), 59 Ill. 2d 557, 560-62:

> "The doctrine of collateral estoppel, which bars relitigation of decided question, applies to criminal as well as civil proceedings. (*People v. Grayson*, 58 Ill. 2d 260; *People v. Armstrong*, 56 Ill. 2d 159; *People v. Haran*, 27 Ill. 2d 229, 232.) This was noted in *Ashe v. Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469, 475, 90 S. Ct. 1189, where, in the course of describing the doctrine, the court said:
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> > ' "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer*, 242 U.S. 85 [61 L. Ed. 161, 37 S. Ct. 68, 3 A.L.R. 516]'
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> * * * * * * *
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> This court noted in *People v. Haran*, 27 Ill. 2d 229, 231, that the doctrine of collateral estoppel was 'well defined' in *Hoffman v. Hoffman*, 330 Ill. 413. There it was said: 'Where some controlling fact or question material to the determination of both causes has been adjudicated in the former suit by a court of competent jurisdiction and the same fact or question is again at issue between the same parties, its adjudication in the first cause will, if properly presented, be conclusive of the same question in the later suit, irrespective of the question whether the cause of action is the same in both suits or not. This is sometimes denominated

as an estoppel by verdict. (*Public Utilities Com. v. Smith*, 298 Ill. 151.) The rule in respect to the conclusiveness of the verdict and former trial between the same parties, when the judgment is used in pleading as a technical estoppel or is relied on by way of evidence as conclusive *per se*, is, that it must appear by the record of the prior suit that the particular controversy sought to be construed was necessarily tried and determined,—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter it will be considered as having settled that matter as to all further actions between the parties; and further, in cases where the record does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact. But even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the present suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination it will not be concluded.' 330 Ill. 413, 417."

There are at times problems presented in seeking to apply the doctrine of collateral estoppel in criminal cases; it is sometimes difficult to determine what facts were actually adjudicated by the former verdict. (See *People v. Haran* (1963), 27 Ill. 2d 229, 235.) Where the prosecution has had to prove several elements, a verdict of acquittal does not inform as to the basis for the jury's verdict. But the difficulties of application are not, of course, insuperable. This was illustrated by the Supreme Court in *Ashe v. Swenson* (1970), 397 U.S. 436, 414, 25 L. Ed. 2d 469, 475-76, 90 S. Ct. 1189, 1194:

"The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied

with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' *Sealfon v. United States*, 332 U.S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal."

The defendant says that the only contested issue in both trials was whether he had the required criminal intent. In the Federal trial the question was whether he had a scheme and intent to defraud the State of Illinois, he says, and in the State trial the question was whether he had the wrongful intent to deprive the State of Illinois permanently of the use and benefit of the money. He states that the evidence presented in each prosecution on the issue of intent was the same and that the fraudulent intent that had to be shown in both cases was the same. From this he contends that the Federal jury, by acquitting him, in the language of section 3-4(c)(2), made a "determination inconsistent with any fact necessary to a conviction in the prosecution in this State." That is, he says, since the verdict in the Federal prosecution decided the issue of fraudulent intent the issue was also settled so far as a State prosecution would be concerned and thus the State was barred from prosecuting him. We consider that the defendant's contention is correct.

He has filed here the record in his Federal trial. The evidence in both the Federal and State trials was, with minor exceptions, the same. In both cases the prosecution showed that the defendant signed the vouchers and the bill forms, that Jeanette Weber performed minor secretarial services for the defendant, that she endorsed the warrants and turned them over to Homeier, and that the defendant received approximately $1,200 of the funds obtained. In the Federal trial it was also shown that the mails had been used.

The defendant did not challenge any of this evidence in either of the trials. Indeed, he freely admitted that he had used the vouchers to obtain funds for himself. He testified that in the late 60's and early 70's he was concerned about disturbances at campuses at various State-supported colleges in Illinois. He said that in the spring of 1969 he was approached by Dan Jones, who offered to gather information for him about campus unrest. He testified that over a 12-month period Jones reported to him on numerous occasions about "radical activities" on college campuses and that he used this information to draft bills and resolutions in the legislature. He stated, too, that he paid Jones $2,450 from his own funds for this undercover work and that Jones refused to sign a State voucher or give the defendant his social security number because he, Jones, said that his life would be in danger if his identity became known. At their last meeting in June of 1970, the defendant said, he persuaded Jones to sign cards which showed the date and amount of all the payments he had made to Jones. The defendant said he did not know the whereabouts of Jones and that he was unable to produce Jones as a witness. The copies of the cards were introduced into evidence at both trials.

Borchers said that he felt that the cost of employing Jones was an expense that could be legitimately charged against his legislative expense account. He could not, however, obtain funds for this purpose without Jones' signature on the voucher

and his social security number. He testified that in the early spring of 1970 he approached Christian Homeier, the fellow legislator, and asked Homeier if he knew of a way in which the defendant could secure funds through his expense account to reimburse himself for the expenses he incurred in the employment of Jones. Borchers said that Homeier told him to sign a blank voucher and bill form for $1,500 and that Homeier later gave him $1,100. He said that at that time he was under the impression that the voucher had been filled in to show that the money was to be used for campus investigations and that Homeier was to give the $400 to Jeanette Weber to pay for the income taxes she would owe on the $1,500 since she appeared as the payee on the voucher and to compensate her for some clerical work she had performed for him. He testified that in July of 1970 he had instructed Miss Weber to fill out the second voucher for $150 to show that the money was for investigative purposes; that he signed the voucher before she filled it in, and that he kept $100 and gave her $50 to pay her for some clerical services and to cover her income tax. He stated that he did not find out until October of 1973 that Homeier had kept the $400 from the proceeds of the first voucher and had gotten the $50 from the second voucher and that the vouchers had not been filled in and submitted according to his instructions.

In his closing argument at the Federal trial, the attorney for the defendant stated the only question that was presented by the evidence for the jury's determination:

> "So, we boil ourselves down after all these days of evidence and argument and questions and what have you to a really rather simple narrow issue and that is that when Mr. Borchers submitted these vouchers or caused them to be submitted did he do so with bad faith and with an intent to defraud the State of Illinois and intend to steal money for his own use and benefit, or did he on the other

> hand act in good faith in submitting these vouchers believing that he had a right to use the money to reimburse himself for the payment of the investigator to whom he had advanced money over a period of time and for whom he submitted these vouchers."

Similarly in the State prosecution, no other question—such as whether the vouchers had been submitted to the State—being in dispute, the only question presented for the jury's determination was the defendant's intent. That question could be stated: "Did the defendant when he submitted the vouchers wrongfully intend to permanently deprive the State of Illinois of the use and benefit of the money or did he intend to use the money simply to reimburse himself for the expenses he incurred in employing the investigator?"

We have reviewed the records in the Federal and State trials, and they are practically alike so far as the evidence presented is concerned. Indeed, it can be said here that the two records excepting, of course, proof of use of the mails, are nearly interchangeable, even as to the reputation witnesses called by the defendant. With a few minor exceptions the testimony is the same. Viewing the question realistically and "set in a practical frame" (*Ashe v. Swenson* (1970), 397 U.S. 436, 444, 25 L. Ed. 2d 469, 475-76, 90 S. Ct. 1189, 1194) we consider that the questions were the same. The controlling fact or question in both prosecutions was whether or not the defendant had an intent to commit a fraud. The verdict of acquittal in the Federal prosecution resolved this factual question in favor of the defendant, and his conviction under the State prosecution required that the same factual question be resolved in favor of the prosecution. Thus relitigating this factual question was violative of the doctrine of collateral estoppel.

A case with resemblance to the one here is *Johnson v. Estelle* (5th Cir. 1975), 506 F.2d 347, *cert. denied* (1975), 422 U.S. 1024, 45 L. Ed. 2d 682, 95 S. Ct. 2619, which involved a

question of specific criminal intent. There the United States Court of Appeals for the Fifth Circuit held that under the doctrine of collateral estoppel a second prosecution was barred in a case in which one of the questions presented to the juries in two successive trials was whether the defendant had an intent to commit rape. Billy Lee Johnson was found not guilty of "burglary of a private residence at nighttime with intent to commit rape," and five months later he was convicted of "assault with intent to commit rape." (506 F.2d 347, 348.) Both charges grew out of the same incident of home invasion. The court first noted that only two issues were presented at the first trial upon which the jury could have based its verdict of acquittal and which were at issue in the second trial: (1) Was Johnson the assailant; and, (2) did the assailant have the intent to commit rape. (506 F.2d 347, 350.) The court then concluded that the second prosecution was barred by the doctrine of collateral estoppel because the jury in the first trial in order to have acquitted Johnson must have found against the prosecution on one of the two issues and because the prosecution had to prove both issues in the second trial in order to have obtained a conviction. The court was not impressed by the speculative contentions of the State that the first acquittal might have been grounded on a relatively minor distinguishing circumstance, for example, a failure to prove the private character of the residence entered or that the defendant entered without breaking. The court said:

> "By its injunction to apply collateral estoppel with 'realism and rationality' we believe that the Supreme Court [in *Ashe*] means that we should not allow a second trial, merely because technical requisites of the first charge are not involved in the second, where there is no evidence suggesting that those factors were even presented to the first jury for its active consideration. * * *
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> We are convinced that both juries stood their decisions on identity of assailant and intent to rape and did not

engage in mental gymnastics so as to land on differing components." *Johnson v. Estelle* (5th Cir. 1975), 506 F. 2d 347, 352. See also *United States v. Brown* (8th Cir. 1977), 547 F.2d 438, *cert denied* (1977), — U.S. —, 51 L. Ed. 2d 784, 97 S. Ct. 1566; *McDonald v. Wainwright* (5th Cir. 1974), 493 F.2d 204; *United States v. Nash* (4th Cir. 1971), 447 F.2d 1382.

For the reasons given, the judgment of the circuit court is reversed.

Judgment reversed.